No. 90-6105-CFY
Status: GRANTED

Title: John H. Evans, Jr., Petitioner
v.
United States

Docketed:
October 29, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

See also:
89-1918

Counsel for petitioner: Abbott,C. Michael

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 29 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 27 1990		Order extending time to file response to petition until December 28, 1990.
5	Dec 28 1990		Brief of respondent United States in opposition filed.
6	Jan 9 1991		Reply brief of petitioner John H. Evans, Jr. filed.
7	Jan 10 1991		DISTRIBUTED. February 15, 1991
8	May 24 1991		REDISTRIBUTED. May 30, 1991
10	Jun 3 1991		Petition GRANTED.
			**********
11	Jun 12 1991	G	Motion of petitioner for appointment of counsel filed.
12	Jun 24 1991		Motion for appointment of counsel GRANTED and it is ordered that C. Michael Abbott, Esquire, of Atlanta, Georgia, is appointed to serve as counsel for the petitioner in this case.
14	Jul 15 1991		Order extending time to file brief of petitioner on the merits until August 5, 1991.
16	Jul 26 1991		Joint appendix filed.
15	Aug 2 1991		Record filed.
		*	USCA 11-proceedings-one vol.
17	Aug 5 1991		Brief of petitioner John H. Evans, Jr. filed.
18	Aug 12 1991		Record filed.
		*	USDC ND GA-3 vol. pleadings; 41 vol. transcript.
19	Sep 9 1991		Brief of respondent United States filed.
20	Oct 9 1991		Reply brief of petitioner John H. Evans, Jr. filed.
21	Oct 15 1991		SET FOR ARGUMENT MONDAY, DECEMBER 9, 1991. (4TH CASE)
22	Oct 24 1991		CIRCULATED.
23	Dec 9 1991		ARGUED.

90-6105

ORIGINAL

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. _____

PETITIONER'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JOHN H. EVANS, JR., through undersigned counsel, pursuant to Rule 39 of the Rules of the Supreme Court of the United States, moves for leave to proceed in forma pauperis, showing unto this Honorable Court as follows:

(1)

Petitioner, JOHN H. EVANS, JR., is fil'ng contemporaneously with this Motion For Leave To Proceed In Forma Pauperis, his Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit in this case.

(2)

Undersigned counsel was appointed under the Criminal Justice Act of 1964 to represent Petitioner, JOHN H. EVANS, JR., in the United States Court of Appeals for the Eleventh Circuit in this action.

(3)

Other counsel was appointed under the Criminal Justice Act of 1964 to represent Petitioner, JOHN H. EVANS, JR., in the United States District Court for the Northern District of Georgia in this action.

(4)

Petitioner, JOHN H. EVANS, JR., continues to be eligible for appointed counsel under the Criminal Justice Act of 1964 in that he is unable to pay the costs of this proceeding or to give security therefor and believes that he is entitled to redress as further enunciated in his Petition for Writ of Certiorari to the United States Court of Appeals For The Eleventh Circuit.

WHEREFORE, Petitioner JOHN H. EVANS, JR., prays that this Motion for Leave to Proceed In Forma Pauperis be granted and that he be allowed to proceed without being required to prepay fees, costs or give security therefor.

Respectfully submitted,

C. Michael Abbott
Counsel of Record
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 525-6666

AFFIDAVIT

I, C. MICHAEL ABBOTT, certify that I am a member of the Bar of the Supreme Court of the United States, having been admitted on January 10, 1972.

This 26 day of October, 1990.

C. MICHAEL ABBOTT

Sworn to and subscribed
before me this 26 day
of October, 1990.

Notary Public

My commission expires [illegible]

NO._____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

C. MICHAEL ABBOTT
Counsel of Record
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Atlanta, Georgia 30303
(404) 525-6666

QUESTIONS PRESENTED FOR REVIEW

I. MAY AN ELECTED PUBLIC OFFICIAL BE CONVICTED OF EXTORTION UNDER COLOR OF OFFICIAL RIGHT BASED UPON PASSIVE ACCEPTANCE OF A CAMPAIGN CONTRIBUTION IN EXCHANGE FOR A REQUESTED EXERCISE OF OFFICIAL POWER BY AN UNDERCOVER AGENT, ABSENT A REQUIREMENT OF INDUCEMENT BY THE OFFICIAL HIMSELF AND ABSENT A CLEAR JURY CHARGE REGARDING THE MENS REA REQUIRED OF THE OFFICIAL?

II. MAY AN ELECTED PUBLIC OFFICIAL BE CONVICTED OF FILING A FALSE TAX RETURN FOR FAILURE TO INCLUDE AN UNREPORTED CASH CAMPAIGN CONTRIBUTION WHICH WAS NOT CONDITIONED UPON HIS SUPPORT AND WHICH CONSITUTED REIMBURSEMENT OF PERSONAL FUNDS THE CANDIDATE HAD EXPENDED FOR ELECTION EXPENSES?[1]

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[1] Issue II was not separately raised in the Eleventh Circuit. Counsel submits that it is a subsidiary question fairly included in Issue I. See Rule 14.1.(a), Rules of the Supreme Court of the United States.

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REPORT OF OPINION OF ELEVENTH CIRCUIT

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 910 F.2d 790 (11th Cir. 1990).

SUPREME COURT JURISDICTION

The conviction of the Petitioner John H. Evans, Jr. was affirmed by the Eleventh Circuit on September 6, 1990. This Court's jurisdiction to review the Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

18 U.S.C. § 1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

26 U.S.C. § 7206(1)

Fraud and false statements

Any person who--

(1) **Declaration under penalties of perjury.** --Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the United States District Court.

This action commenced on June 16, 1988 in the Northern District of Georgia with a two count indictment against John H. Evans, Jr. alleging the defendant extorted $8,000 from an FBI undercover agent in violation of Title 18, United States Code, § 1951 and that $7,000 of that payment was not reported on his Form 1040 individual income tax return for the year 1986, in violation of Title 26, United States Code, § 7206(1).[2]

Mr. Evans entered a plea of not guilty on June 22, 1988. He was tried before a jury with the Hon. Horace T. Ward, United States District Judge, presiding. The trial commenced on January 30, 1989. The jury returned a verdict of guilty on both counts on March 13, 1989. [R44,7].

On May 16, 1989, John H. Evans, Jr. was sentenced to the Custody of the Attorney General for 18 months on the extortion offense under 18 U.S.C. § 4205(b)(2). On the tax charge, Evans received an 18 months suspended sentence with 4 years probation and special conditions that Evans not seek nor hold public office during the probation period and that he cooperate with the Internal Revenue Service in resolving his tax liability. Evans also

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[2] "R" refers to the bound volume of the record from the district court. "T" refers to the transcript of the taped conversations played for the jury and admitted as a government exhibit.

received a $50.00 assessment on each count. [R43,107-08]. Evans served a period of incarceration and is currently on parole.

On August 4, 1989, defendant filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals. [R3,106]. The conviction was affirmed by the Eleventh Circuit on September 6, 1990.

B. Statement of Facts

John H. Evans, Jr., was elected to the Board of Commissioners in DeKalb County, Georgia in 1982, the first black ever to be elected to that body. Although Evans' position on the DeKalb County Commission was considered to be half time, Evans devoted full time to his Commission duties. His annual salary as a Commissioner was approximately $16,000. [R32,34-51; R38,47].

In March of 1985, with no prior allegation of corruption against Evans, the Federal Bureau of Investigation began an investigation of him that was to continue for the next 31 months, through October of 1987. The investigation produced 28 secretly taped recorded conversations with Evans, and five contacts that were not recorded. [R25,72]. Virtually every contact with Evans over the 2 1/2 year investigation was initiated by the FBI.[3]

The focus of the undercover investigation in this case occurred during Evans' successful re-election campaign of 1986. Evans was indicted for accepting an $8,000 contribution from an undercover agent and not reporting $7,000 of that amount on his

[3] There is conflicting testimony with respect to the phone call which triggered the July 24, 1986 meeting.

1986 income tax. Evans contentions are that he accepted a campaign contribution from the agent that was unrelated to his assistance and that he used the money for debts of his campaign and office. He denied that he extorted money and asserted he was entrapped in not disclosing $7,000 of the $8,000 he received. Quoting from the opinion of the Court of Appeals:

> "In early 1985, Clifford Cormany, Jr. ("Cormany"), a special agent with the Federal Bureau of Investigation ("FBI") was assigned to Atlanta to assist in conducting an undercover investigation to be known as "Operation Vespine," into allegations of public corruption in the Atlanta area, particularly in the area of rezoning of properties. Using the identity of "Steve Hawkins," Cormany represented himself as a land developer of the company WDH, who had recently moved to the Atlanta area. Cormany told other people that he represented a group of investors that was considering developing various land projects in DeKalb County.
>
> In March of 1985, Albert E. Johnson, who was a subject of the investigation[4] arranged a meeting between Cormany and John H. Evans, a member of the Board of Commissioners in DeKalb County. During this meeting Johnson told Evans that Cormany's investment group was looking for assistance with matters related to rezoning and variances.

[4] Johnson did not learn of Cormany's true identity until November of 1985, at which point Johnson agreed to assist in the investigation.

Subsequently, between August, 1985, and October, 1986, a series of meetings and telephone conversations between Evans and Cormany ensued. Almost all of these meetings and conversations were video-taped, and they formed a substantial part of the evidence presented by the government at trial.

During the first of these meetings, in August of 1985, Evans was informed by Johnson and Cormany that Cormany wanted to let his investment group know that it had a "leg up" on other developers in DeKalb County. He aimed to achieve this "leg up" by letting the developers know that WDH was associated with the bodies that governed such things as zoning requests. Evans agreed to help set up meetings for Cormany and Johnson with other commissioners."[5]

Johnson stated that they were not talking about "anything illegal," [1T,43], and would not be asking for anything unreasonable where they wouldn't have a good chance to succeed. [1T,48]. He went on to further explain the concept of a "leg up" as involving and educating others as to their plans:

> Johnson: And all we're asking for is to be able to tell these people [investors] . . . we feel very very confident and we do kinda have a leg up . . . on the others. We've taken the time, taken the opportunity to, made the opportunity . . . and, taken the time to get acquainted . . . to explain the program a little bit. [1T,56].

Beginning with the first videotaped meeting, Evans repeatedly encouraged the agent and Johnson to talk with Charlie Coleman, the professional staff zoning administrator, to get a feeling for what

[5] United States v. Evans, 910 F.2d 790, 792 (11th Cir. 1990).

was feasible, pointing out that it was with Coleman's office where adjustments in projects were hammered out. [1T,29]. Evans also suggested that Johnson and Cormany meet face to face, first with "two or three of the more sensitive" Commissioners, but eventually with all of them so that Cormany and Johnson could talk independently of Evans and the Commissioners would get to know who they were and what they were about. [1T,35,42,49]. This was Evans' perception of a "leg up." [R32,76; R34,58]. The agent said they were in favor of doing that. [1T,49].

Evans was not contacted again until some nine months later in May of 1986. Johnson was then cooperating with the FBI. [R28,15]. Throughout the undercover operation, Johnson and the agent would never use the word "payoff" nor openly acknowledge they had anything illegal in mind. As a result, it was never clear that Evans "caught on" to their scheme. In May, the agent and Johnson talked about how they wanted to get the highest density possible and were willing to do what needed to be done to get it. They did not explain what they meant. [2T,12-13].

There was discussion of Evans' campaign for re-election which was just getting off the ground. The primary was on August 12th, 1986. Earlier in the meeting Johnson had asked what size contribution Evans would consider "meaningful." Evans replied by referring to a recent breakfast held for him where guests were encouraged to contribute $1,000 apiece. [2T,27,28; R30,240]. Johnson asked Evans if he needed "any expense money for coming out here this morning?" [2T,36]. Evans took the remark to mean

campaign expenses. He said he needed help with a mailing and estimated that between the voter registration list and mailing labels, it would cost him about $260.00. [2T,37]. Evans was given a $300 contribution. [2T,41]. The evidence showed that he spent $284.56 for items relating to his mailing in May of 1986, including over $200 that very day for labels and postage. [R15,84-86]. Evans properly disclosed the agent's contribution and sent a thank you note. [R33,9]. He made no attempt to recontact the agent or Johnson.

Five weeks later, on July 8, 1986, Cormany and Johnson asked Evans to meet with them for lunch where they informed Evans that they had a particular tract of land in mind. As he had in their previous meetings Evans recommended that Johnson and the agent meet with staff professional Charlie Coleman of the Planning Department for assistance. [R22,86,87; See also 1T,29; 2T,23].

There are two versions of what happened on the morning of July 23, 1986, about three weeks before the primary. The agent said that Evans called him at his undercover apartment. [R22,89]. Evans said he was returning the agent's call and introduced his phone messages into evidence showing a call from the agent ["Hawkins"] that morning giving the number for the agent's undercover apartment. [R33,18-19]. Two of three conversations that morning between the agent and Evans were not recorded by the agent so that there were conflicting versions over whether Evans mentioned his campaign and whether the agent asked Evans to bring a list of his campaign needs to their meeting the next day. [R22,

90-91; R33,15-49; R39,65].

Evans and the agent met on July 24. Evans stated that of his $14,180 budget covering June 29 to primary day August 12, he had received $6295, leaving a shortfall of $7885. [7T,31-33]. The agent noticed that Evans' budget only went through August 12, the inference being that perhaps Evans could use even more money for the general election. Evans said he had no need for campaign money after August 12 because if he got past the primary, he had no opposition in the general election. [7T,31]. The following conversation then ensued, quoting from the appellate court's decision:

Cormany: Can I, can I talk frankly with you . . .

Evans: Yeah.

. . .

Cormany: And, and this is between you and I. I need, I desperately need, your help and your support on this project. You, I'm in one business, you're in another.

Evans: Yeah, yeah, you got me.

Cormany: You're, you're the influence you have over there, and the assistance you have over there, I can probably cover that for you.

Evans: Well, let me tell you. I, it's it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that.

Cormany: You're talking about seven eight eighty-five.

Evans: Right.

Cormany: That's the balance of what the . . .

Evans: Of what the budget was from June 29th through August 12.

Cormany: But what I'm asking you John, I mean, is if I pick up the entire amount, I mean, does that, would that satis-- would that be a reasonable relationship, a reasonable

. . . . .

Evans: Oh, I'll, let me let me make sure, and I understand both of us are groping . . .

Cormany: Yeah.

Evans: ... for what we need to say to each other.

. . . . .

Cormany: All I want . . . let me, let me kinda . . .

Evans: I'm gonna work. Let me tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean?

Cormany: Yeah.

Evans: If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.

Cormany: I understand.

Evans: You see, what I'm doing is giving you a fair assessment of what my needs are to be re-elected on August 12th.

Cormany: Okay.[6]

Evans told Cormany that regardless of how Cormany helped him, he "would not jump out the ninth floor window," but would just do what he though was prudent under the circumstances. [7T,41].

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[6] United States v. Evans, 910 F.2d 790, 793-794 (11th Cir. 1990).

Cormany suggested that he and Evans would have a budget even if it were not an election year and Evans said he understood. [7T,53-54].

Evans never suggested that the undercover agent needed to make a campaign contribution. He was willing to accept a campaign contribution for the primary only but had long ago promised his support and he "wanted to make clear" that promise stood, regardless of the size of any contribution Hawkins wished to make. [7T,35; R33,76-78].

The agent wished to contribute $8,000.00, the full amount of Evans' budget shortfall. Evans testified that the amount surprised him and was so great he feared his constituents would not understand it. When the agent offered "cash" or "check", Evans therefore decided to take the bulk of it in cash, "so there won't be any tinges, or anything", recording only a $1000 check. [7T,44; R16,79,80; R17,100]. Cormany then instructed Evans to keep the matter confidential beween the two of them and Evans agreed to do so. [7T,45].

The $8,000 was the largest contribution of the campaign, eight times what Evans suggested to Al Johnson in May would be a "meaningful" contribution and was by far the largest contribution Evans had ever received as a public official. [R33,76-77]. Evans did not report the $7,000 he received from Cormany on his 1986 tax return nor on the required state disclosure form.

Thereafter, it was discovered for the first time that there was a two year moratorium on rezoning Cormany's parcel of land which would require a waiver if a zoning application were to be

considered. Evans set up luncheon meetings with two commissioners so that Cormany could familiarize them with his project and the waiver. The waiver passed the Commission 4-0 and the undercover agent personally lobbied for 3 of the 4 votes he received, including Evans. [R24,68,69].

As late as October 8, 1986, the last time Evans met with the agent on this project, Evans repeated what he had said on July 24, i.e., that he wanted to make clear he could not guarantee results and did not control other Commissioners:

> Evans: Let me tell you, what you have to do is you have to . . . check with the folk and then you pray a little bit, like in all cases, that something doesn't trigger off some other reaction. And nobody ever knows that. Nobody ever knows that. I don't care what, . . . it is or who it is or even if . . . Joe Frank Harris [Governor of Georgia] came up there, he couldn't be sure of nothing. I mean I say that just to make that you're clear . . . that I don't think any of us have that kind of superior control over anybody for any reason . . . . [26T,32].

In late October, 1986, Cormany decided to end the project by withdrawing the zoning application without prejudice. He wrote a letter to each Commissioner explaining his position. [R25,64-66]. The agent appeared before the Board of Commissioners the following day in his undercover capacity and the Board unanimously agreed (7-0) to allow him to withdraw his petition without prejudice. [R25,66].

The agent's contacts with Evans did not end at that point. He called Evans twice in 1987, once in April and once in May. He tape recorded a meeting with Evans at Evans' home in May of 1987. [R25,69]. None of these contacts was fruitful in terms of

obtaining additional evidence against Evans and none was played for the jury. No Commissioner or other witness ever testified that Evans attempted to influence them in any way on Cormany's project, or any other.

Although Evans spent the money he had projected on the list he showed to the agent he ended up both raising more and spending more than he had anticipated. At the end of his campaign even though he had spent almost $7,000 more than his $14,000 projected budget he still had a surplus of over $7,000, including the cash contributed by Cormany. [R33,87-89; R34,25-26]. Evans testified that since he had money left over from the campaign, he used $4100 of the $7,000 cash from the agent to repay his mother who had loaned him $5200 for his first campaign in 1982. That $5200 cash loan from his mother had been duly recorded on Evans' 1982 disclosure form for his 1982 campaign. [R33,97]. Evans made the $4100 partial repayment to his mother in cash in November of 1986, [R33,99]. In December of 1986, he used the rest of the $7,000, a sum of $2900, to repay himself for loans he had made to his own campaign over the years 1982-86. [R33,100-01]. These repayments both occurred before he knew he was under investigation.

On October 7, 1987, two FBI agents went unannounced to Evans' office to see if he would disclose the amount that the agent had given to him. They did not tell him that he was a target of an investigation and they misrepresented their official purpose. [R28, 137]. In response to a question asking Evans to identify persons who contributed more than $500 to his campaign, Evans identified

Cormany ["Hawkins"], but incorrectly stated there were no additional monies not reported from anyone on the list of names shown to him. [R28,130-31]. Cormany had earlier solicited a promise from Evans that neither of them would disclose the additional amount to anyone. [7T,45,47].

Because of the size of the contribution and because the agent asked him not to disclose the money, Evans said he did not record the $7,000 in cash on his books nor on the required state disclosure form. He also did not record the repayment to his mother or the repayments to himself. Later, when Evans recorded these payments in his books in order to keep them straight and amended his state disclosure forms, he had not been indicted but knew he was under investigation and had counsel. [R33,96-104,106].

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIOARI

I. THE DECISION IN THIS CASE FROM THE ELEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH EN BANC CASES FROM THE SECOND AND NINTH CIRCUIT COURTS OF APPEAL.

United States v. Evans, 910 F.2d 790 (11th Cir. 1990), is in direct conflict with en banc decisions of the Ninth Circuit in United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc) and the Second Circuit in United States v. O'Grady, 742 F.2d 682 (2nd Cir. 1984)(en banc).

In the Eleventh Circuit, the court in United States v. Evans held that passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit. United States v. Evans, 910 F.2d 790, 796 (11th Cir., 1990).

In the Ninth Circuit, however, proof that a defendant personally "induced" an improper payment is an essential element in the crime of extortion under color of official right and mere acceptance of a payment to perform a public act is not extortion under the Hobbs Act. United States v. Aguon, 851 F.2d 1158, 1167 (9th Cir., 1988)(en banc). Likewise, in the Second Circuit, a public official who accepts an unsolicited benefit given because

of the public office is not chargeable with extortion under color of official right. United States v. O'Grady, 742 F.2d 682, 684 (2nd Cir., 1984)(en banc).

II. THIS COURT GRANTED THE PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT IN NO. 89-1918, McCORMICK V. UNITED STATES, WHICH POSES QUESTIONS FOR REVIEW UNDER THE HOBBS ACT, 18 U.S.C. § 1951, AND UNDER 26 U.S.C. 7206(1), WHICH ARE SIMILAR IF NOT IDENTICAL TO THE QUESTIONS PRESENTED HERE IN UNITED STATES V.EVANS

On October 1, 1990, this Court granted the petition for writ of certioari to the Fourth Circuit in No. 89-1918, McCormick v. United States. United States v. Evans presents similar issues under the same two federal statutes, 18 U.S.C. § 1951 (The Hobbs Act), and 26 U.S.C. § 7206(1), filing a false income tax return.

III. THE HOLDING OF THE ELEVENTH CIRCUIT THAT PASSIVE ACCEPTANCE OF A CONTRIBUTION IN EXCHANGE FOR A REQUESTED EXERCISE OF OFFICIAL POWER BY AN UNDERCOVER AGENT IS SUFFICIENT FOR A HOBBS ACT VIOLATION, THE LACK OF A REQUIREMENT OF INDUCEMENT BY THE DEFENDANT HIMSELF AND THE ABSENCE OF A CLEAR JURY CHARGE REGARDING THE MENS REA REQUIRED OF THE DEFENDANT MAKE THIS CASE SUFFICIENTLY DISTINGUISHABLE FROM McCORMICK THAT EVANS SHOULD BE SET DOWN FOR BRIEFING AND ARGUMENT WITH McCORMICK v. UNITED STATES

United States v. McCormick, 896 F.2d 61, 65 (4th Cir. 1990), granted cert this term by the Court, held that a voluntary campaign contribution received by a public official is not a violation of the Hobbs Act. Quoting from United States v. Dozier, 672 F.2d 531, 537 (5th Cir.), cert. denied, 459 U.S. 943, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982), the Fourth Circuit went on to say that "a

public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." Id., at 65-66. However, McCormick held that an explicit quid pro quo is not required for a Hobbs Act violation if the actual intent of the parties as shown by the circumstances proves that payments were never intended to be legitimate campaign contributions. Id. at 66.

Thus, in the Fourth Circuit, apparently a Hobbs Act violation must include inducement as prescribed by 18 U.S.C. § 1951(b)(2)[7], but does not require an explicit quid pro quo. United States v. McCormick, supra.

Inducement is also required in the Eleventh Circuit for a Hobbs Act violation. United States v. Evans, 910 F.2d 790, 796 (11th Cir. 1990). However, the defendant himself need take no specific action since the power of public office is deemed to automatically supply that element of the statute. Thus, in a Hobbs Act case involving a public official, the element of inducement is always satisfied:

> [T]he requirement of inducement is automatically satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the office provides all the inducement necessary." (citation omitted). United States v. Evans, 910 F.2d 790, 796-797 (11th Cir. 1990).

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[7] Title 18, Section 1951(b)(2) reads as follows:

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The Eleventh Circuit concedes that the "requirement" of inducement is "somewhat academic" since "[a] condition that is always satisfied ceases to be a true condition." Id. at 796, n.5.

Apparently because "inducement" is automatically present in all Eleventh Circuit cases involving a public official under the Hobbs Act, the obvious lack of effect the "coercive nature of the office" would have on an undercover agent is of no significance. This interpretation of "inducement" as well as the introduction of an undercover agent in the factual setting of Evans are elements not present in McCormick.

Secondly, the Eleventh Circuit goes further than the Fourth Circuit in McCormick, supra, by holding that a passive acceptance of a contribution is sufficient for a Hobbs Act violation if the public official has knowledge of the motivation of the contributor:

> We agree with Evans's observation that the charge permitted the jury to convict Evans without finding that he conditioned the performance of an official act upon payment of money.[8] Under the law of this circuit, however, passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power.[9] The official need not take any specific action to induce the offering of the benefit. Id. at 796.

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[8] The panel in McCormick would apparently disagree with this statement based on the passage from Dozier cited in the McCormick opinion, supra.

[9] McCormick cites a passage from a Fourth Circuit opinion regarding an official's knowledge which parallels this statement from Evans. See United States v. Barber, 668 F.2d 778, 783 (4th Cir.), cert. denied, 459 U.S. 829, 103 S.Ct. 66, 74 L.Ed.2d 67 (1982), cited in United States v. McCormick, 896 F.2d at 64-65.

Finally, the jury charge of the district court in Evans also presents issues not found in the McCormick opinion. In count I of the indictment the defendant was charged with a violation of 18 U.S.C. § 1951, extortion "under color of official right." The district court's charge to the jury, in pertinent part, is set out in footnote ten.[10] Reduced to its minimal requirements, the

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[10] The defendant can be found guilty of [Title 18, § 1951] only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.

Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.

So, if a public official agrees to take or withhold official action or (sic) the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.

. . .

The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. [Appendix, pp. 28-29,32-33].

district court's instruction regarding the Hobbs Act provided as follows:

> [I]f a public official ... accepts money in exchange for [a] specific requested exercise of his . . . official power, such a[n] . . . acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. [R41,141].

The charge quoted above was both the most "fact-intensive" in its relationship to the case and also the least exacting in its requirements. It therefore became the lowest common denominator for the jury. Here, it is undisputed that Evans "accepted" a campaign contribution. It is also undisputed that at the time of the agreement, the undercover agent made a "specific requested exercise of [Evans] official power." Because the two occur simultaneously, the inference is that the "acceptance" is "in exchange for" the "request." Under the district court's charge, that "constitute[s] a violation of the Hobbs Act."

Of course, the undercover agent intentionally verbalized "specific requests" of support at the time he was stating he would give Evans $8,000, in order to make it appear that Evans' support was linked to his contribution. However, time and again Evans told the agent he had promised his support and that it was not in issue.

Furthermore, the jury would have been unable to find a clear statement regarding the mens rea required of Evans. The instruction nowhere says it is the intention of the public official not the intention of the undercover agent that matters. The intentions of the undercover agent, of course, were never in doubt.

By its juxtaposition of a "passive" acceptance by Evans and the affirmative "specific request" required of the undercover agent, the district court's instruction appears to focus the jury on the actions of the agent rather than the intent of the public official.

Petitioner submits the Fifth Circuit correctly stated the point in United States v. Dozier, supra:

> The emphasis is on the defendant's own motives rather than on his perception of a potential contributor's motive. The issue is whether Dozier "knowingly and willingly" induced some of his constituents to pay him money by threatening to take or withhold official action, not whether he accepted money as contributions with "knowledge" of a donor's corrupt intent. United States v. Dozier, 672 F.2d at 542.[11]

What the Fifth Circuit in Dozier characterized as not in issue, i.e., "whether [Evans] accepted money as contributions with 'knowledge' of the [undercover agent's] corrupt intent" is, in essence, what the district court charged and what the Eleventh Circuit held was the correct interpretation of the Hobbs Act in Evans:

> In order to secure a conviction under the Hobbs Act, the government must demonstrate, among other things, that the public official knew that the payment he received was motivated by a hope of influence.
> United States v. Evans, 910 F.2d 790, 798 (11th Cir. 1990)[12]

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[11] United States v. Dozier, supra, is not binding on the Eleventh Circuit under Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), as it was decided after September 30, 1981. Id. at 1209.

[12] The Eleventh Circuit stated that its opinion in Evans is consistent with the Fifth Circuit's position, including the Fifth Circuit opinion in Dozier. Id. at 797. Counsel must respectfully disagree.

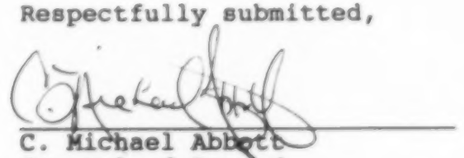
The instructions in Evans are also very close to what the Ninth Circuit found wanting in the panel decision in Aguon. See United States v. Aguon, 813 F.2d 1413, 1415 (9th Cir. 1987). Likewise, the holding of the en banc Ninth Circuit in Aguon focused on the requirement of mens rea in a manner similar to what Petitioner argues for here. United States v. Aguon, 851 F.2d 1158, 1167-69 (9th Cir., 1988)(en banc).

CONCLUSION

These decisions involving public officals and their conduct in office are of sufficient importance that they require a uniformity that only this Court can provide.

Due to the conflict between the Eleventh Circuit in Evans and the Ninth and Second Circuits in Aguon and O'Grady, and because of factual and legal differences in the opinions Petitioners McCormick and Evans seek to review from the Fourth and Eleventh Circuits, Petitioner Evans respectfully prays that his Petition for Writ of Certiorari to the Eleventh Circuit be granted and that the case be set down for briefing and argument with United States v. McCormick, No. 89-1918, a case granted cert by this Court on October 1, 1990.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals by depositing the document in a United States post office with first-class postage prepaid, addressed to counsel of record at the following address:

Hon. Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Dated this 26 day of October, 1990.

C. Michael Abbott
Counsel of Record

NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

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INDEX

all claims to the bankrupt's assets, but it cannot be extended beyond its purpose. That two third parties have an internecine conflict concerning the debtor's property is of no moment once all disputes concerning the creditors' stakes in the bankrupt's property have been resolved.[33] The judgment of the district court is REVERSED and the case is REMANDED with instructions to vacate the judgment of the bankruptcy court.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John H. EVANS, Jr.,
Defendant-Appellant.

No. 89-8631.

United States Court of Appeals,
Eleventh Circuit.

Sept. 6, 1990.

Defendant was convicted in the United States District Court for the Northern District of Georgia, No. CR88-259A, Horace T. Ward, J., of attempted extortion under color of official right in violation of the Hobbs Act and of subscribing to materially false federal income tax return, and he appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) passive acceptance of benefit by public official would be sufficient to form basis of Hobbs Act violation if official knew that he was being offered payment in exchange for specific requested exercise of his official power; (2) government chart and foundation testimony purporting to summarize defendant's finances were properly admitted into evidence; (3) defendant was not entitled to entrapment charge on tax return count, and (4) testimony of linguistics expert regarding taped conversations was properly excluded.

Affirmed.

1. Extortion and Threats ⇐7

Passive acceptance of benefit by public official is sufficient to form basis of Hobbs Act violation, for extortion under color of official right, if official knows that he is being offered payment in exchange for specific requested exercise of his official power; official need not take any specific action to induce offering of benefit. 18 U.S.C.A. § 1951.

2. Courts ⇐90(2), 91(1)

Prior decisions of panels of circuit may only be overruled by en banc circuit or the Supreme Court.

3. Extortion and Threats ⇐5

Government must demonstrate, among other things, that public official knew that payment he received was motivated by hope of influence in order to secure conviction under the Hobbs Act. 18 U.S.C.A. § 1951.

4. Extortion and Threats ⇐16

Instructions given to jury in prosecution of public official for Hobbs Act violation adequately conveyed mens rea requirement for conviction, though district court did not express requirement as clearly as it might have, where jury was advised that public official had to take official action for "wrongful purpose" of inducing victim to part with property and that Government had to prove beyond reasonable doubt that public official induced person to part with property knowingly and willfully by means of extortion; taken as whole, charge given by trial judge properly guided jury and did not offend due process. 18 U.S.C.A. § 1951; U.S.C.A. Const.Amend. 5.

5. Internal Revenue ⇐5294

Government chart and foundation testimony, including $100 per month expense payments received by public official over five years as shown within defense chart purporting to show that public official did

33. *In Re Vance*, 813 F.2d at 131.

not report money received from undercover agent on income tax returns because it amounted to repayment of loans by his office or campaign, were not rendered irrelevant or erroneous because they were contradicted by other evidence at trial, including evidence that public official used the $100 per month for car expenses and that he accordingly expensed $100 per month on tax form as employee business expense. 26 U.S.C.A. § 7206(1); Fed.Rules Evid.Rule 1006, 28 U.S.C.A.

6. Criminal Law ⇐400(1)

District court acted within its discretion in admitting, as summary, government chart that included $100 per month expense payments that public official received over five years as shown within defense chart purporting to show that public official did not report amount received from undercover agent on income tax returns because it amounted to repayment of loan from his office or campaign. Fed.Rules Evid.Rule 1006, 28 U.S.C.A.; 26 U.S.C.A. § 7206(1).

7. Internal Revenue ⇐5294

Internal Revenue Service (IRS) agent's testimony purporting to establish that public official had additional amounts of undeclared income did not set forth impermissible variance from charge, particularly given district court's instruction that defendant was not on trial for any other specified offense not charged in indictment; variance would exist where evidence at trial proved facts different from those alleged in indictment, as opposed to facts which, although not specifically mentioned in the indictment, were entirely consistent with its allegations. Fed.Rules Evid.Rule 1006, 28 U.S.C.A.

8. Criminal Law ⇐772(6)

Giving instruction on entrapment with respect to count charging defendant with attempted extortion under color of official right in violation of the Hobbs Act in no way required district court to give instruction on entrapment with respect to count charging that defendant subscribed to materially false federal income tax return, there was no evidence that Government played any role in defendant's decision, after receiving $8,000, to record only $1,000 as campaign contribution, but even if there were such evidence, defendant's decision not to declare additional $7,000 on his income tax form was wholly separate from his decision not to record it in his campaign ledgers. 18 U.S.C.A. § 1951; 26 U.S.C.A. § 7206(1).

9. Criminal Law ⇐772(6)

Undercover agent's request that defendant public official not inform anyone of payment did not warrant entrapment instruction on count charging defendant with subscribing to materially false federal income tax return, where at no point did agent suggest or request that defendant not report money to the Internal Revenue Service (IRS) in his tax return. 26 U.S.C.A. § 7206(1).

10. Criminal Law ⇐476.6

District court acted within its discretion in excluding, in prosecution of public official for attempted extortion and tax fraud, testimony of linguistic expert regarding structure of conversation in 18 tapes admitted into evidence, on ground that such testimony would not have aided jury in determining what public official's state of mind was when he accepted money from undercover agent and whether official was entrapped, and that testimony presented risk that jury would allow judgment of expert to substitute for its own. 18 U.S.C.A. § 1951; 26 U.S.C.A. § 7206(1).

11. Criminal Law ⇐400(1)

Linguistic expert's charts showing expert's conclusions about "themes" that recurred throughout taped conversations admitted into evidence could be excluded from prosecution against public official for attempted extortion and tax fraud on ground that headings of charts impermissibly reflected expert's opinion as to content of recorded testimony that had previously been presented to jury. Fed.Rules Evid.Rule 1006, 28 U.S.C.A.; 18 U.S.C.A. § 1951; 26 U.S.C.A. § 7206(1).

12. Criminal Law ⇐347

Attorney General's internal guidelines on Federal Bureau of Investigation (FBI) undercover operations were not of sufficient relevance to jury's determination on question of entrapment to warrant their admission in prosecution of public official for attempted extortion under color of official right in violation of the Hobbs Act; defense of entrapment concerned only public official's lack of predisposition to commit crime, and if public official was predisposed to commit crime, he could not be entrapped, regardless of how outrageous or overreaching Government's conduct might have been. 18 U.S.C.A. § 1951.

C. Michael Abbott, Atlanta, Ga., for defendant-appellant.

Robert L. Barr, Jr., U.S. Atty., William Gaffney, Asst. U.S. Atty., Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

John H. Evans, Jr. appeals his conviction on one count of attempted extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951, and one count of subscribing to a materially false federal income tax return for 1986 in violation of 26 U.S.C. § 7206(1). We affirm his convictions on both counts.

BACKGROUND

In early 1985, Clifford Cormany, Jr. ("Cormany"), a special agent with the Federal Bureau of Investigation ("F.B.I.") was assigned to Atlanta to assist in conducting an undercover investigation, to be known as "Operation Vespine," into allegations of public corruption in the Atlanta area, particularly in the area of rezoning of properties. Using the identity of "Steve Hawkins," Cormany represented himself as a land developer of the company WDH, who had recently moved to the Atlanta area. Cormany told other people that he represented a group of investors that was considering developing various land projects in DeKalb County.

In March of 1985, Albert E. Johnson, who was a subject of the investigation,[1] arranged a meeting between Cormany and John H. Evans, a member of the Board of Commissioners in DeKalb County. During this meeting, Johnson told Evans that Cormany's investment group was looking for assistance with matters related to rezoning and variances.

Subsequently, between August, 1985, and October, 1986, a series of meetings and telephone conversations between Evans and Cormany ensued. Almost all of these meetings and conversations were videotaped or audio taped, and they formed a substantial part of the evidence presented by the government at trial.

During the first of these meetings, in August of 1985, Evans was informed by Johnson and Cormany that Cormany wanted to let his investment group know that it had a "leg up" on other developers in DeKalb County. He aimed to achieve this "leg up" by letting the developers know that WDH was associated with the bodies that governed such things as zoning requests. Evans agreed to help set up meetings for Cormany and Johnson with other commissioners.

Evans was contacted nine months later, in May of 1986, at which time Johnson and Cormany informed him that they wanted to get an area zoned for the highest density possible and that they were willing to do whatever was needed in order to get the zoning passed. There was also discussion of Evans's campaign for reelection which was just getting off the ground. In response to a query from Johnson about what size contribution would be considered meaningful, Evans replied that at a recent fundraising event, contributors were encouraged to give a thousand dollars apiece. Johnson then asked whether Evans needed any "expense money." Evans stated that

1. Johnson did not learn of Cormany's true identity until November of 1985, at which point Johnson agreed to assist in the investigation.

he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that it would cost him about $260 and Cormany wrote out a check to Evans for a $300 contribution. Evans used this money to buy the list and sent a thank-you note to Cormany.

In July, 1986, Cormany and Johnson met Evans for lunch and informed him that they had a particular tract of land in mind that they wanted to get rezoned to a higher density. They told Evans that expense monies would be available for Evans if needed. Evans recommended that they meet with members of the DeKalb County Planning Department so they could get their rezoning application filed as soon as possible.

On the morning of July 23, 1986, Evans called Cormany at his undercover apartment. The parties disagree as to whether Evans initiated this call. At trial, Evans testified that he was returning a call that had been placed by Cormany. Cormany testified that the call he received was unsolicited. This call was not recorded. Cormany testified that he did not record the call because he was not expecting a call at his home and had not set up any recording equipment. Cormany further testified that at the end of the conversation, which concerned the filing of the zoning petition, Evans replied that he was "running hard and pulling teeth." Cormany testified that he thought that Evans's references to his campaign were an attempt to discuss money opportunities with him in connection with his rezoning efforts. Later that day, Cormany and Evans spoke again in order to arrange a meeting for the next day. According to Evans, Cormany also told him to bring an indication of his campaign needs. Cormany denied that he asked Evans to prepare any list. This conversation also was not recorded.

Cormany and Evans met on July 24, at which time Cormany informed Evans that there was a "generous budget for anything we do." Evans then produced a document which he referred to as the "draft constitution of the United States," which contained his campaign budget from June 29 to August 12, the date of the primary. The document apparently showed his outstanding campaign debts as well as an estimate of his anticipated campaign expenses throughout the primary. Evans stated that of his $14,180 budget, he had received $6,295, leaving a shortfall of $7,885. At this point the following conversation ensued:

Cormany: Can I, can I talk frankly with you ...

Evans: Yeah.

. . . . .

Cormany: And, and this is between you and I. I need, I desperately need, your help and your support on this project. You, I'm in one business, you're in another.

Evans: Yeah, yeah you got me.

Cormany: You're, you're the influence you have over there, and the assistance you have over there, I can probably cover that for you.

Evans: Well, let me tell you. I, it's it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that.

Cormany: You're talking about seven eight eighty-five.

Evans: Right.

Cormany: That's the balance of what the ...

Evans: Of what the budget was from June 29th through August 12.

Cormany: But what I'm asking you John, I mean, is if I pick up the entire amount, I mean, does that, would that satis— would that be a reasonable relationship, a reasonable

. . . . .

Evans: Oh, I'll, let me make sure, and I understand both of us are groping ...

Cormany: Yeah.

Evans: ... for what we need to say to each other.

. . . . .

Cormany: All I want ... let me, let me kinda ..

Evans: I'm gonna work. Let me tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean.

Cormany: Yeah.

Evans: If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.

Cormany: I understand.

Evans: You see, what I'm doing is giving you is a fair assessment of what my needs are to be re-elected on August 12.

Cormany: Okay.

After some intermediate conversation, the interchange continued as follows:

Cormany: You need cash?

Evans: Yeah ...

Cormany: Check?

Evans: I think we better do it that way.

Cormany: Cash?

Evans: Yeah, I think so in this case.

Cormany: Okay.

Evans: I think so, so there won't be any, any, tinges, or anything.

Cormany: Okay.

Evans: Or, we can do this.

Cormany: You, you, tell me how you prefer it done?

Evans: I mean, let me, let me tell ya'.

Cormany: I can write the check ...

Evans: I know.

Cormany: Or I can give you, I can give you ...

Evans: Okay, I'll tell you now, we don't have to do that. What you do, is make me out one, ahh, for a thousand.

Cormany: Make you out a check for a thousand?

Evans: And, and that means we gonna record it and report it and then the rest would be cash.

Cormany: The rest will be cash?

Evans: Yeah.

Later in the meeting, the conversation continued as follows:

Cormany: But, I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way.

Evans: I understand. Oh, I understand that.

Cormany: And you and I would have a budget either way.

Evans: Either way, yep. Oh, I understand that. I understand.

Later that day, Cormany tried to file the application for rezoning of the property, but the application was rejected because the property had been rezoned less than two years before. Evans and Cormany met on July 25, at which time the conversation centered around whether or not this two-year requirement could be waived. At this meeting, Cormany gave Evans $7,000 in cash, which Evans placed in an envelope, and a check for $1,000 payable to the "John Evans Campaign." Evans locked the $7,000 in cash in a drawer in a file cabinet in his campaign office. Evans did not at that time record the $7,000 in cash given to him by Cormany on his books nor on the required state disclosure form. Evans did not report the $7,000 he received from Cormany in his 1986 tax return.

At the August 12 DeKalb County Commission meeting, the waiver was granted by a vote of 4 to 0. On August 27, Cormany filed his application for rezoning. On August 28, Cormany informed Evans that approval of the application would require an amendment to the comprehensive land use plan from low density residential to medium residential.

In early October of 1986, the county's Planning Department recommended denial of Cormany's application to amend the land use plan. On October 28, Cormany decided to end the project by withdrawing the zoning application without prejudice, and the Commission agreed to allow the application to be withdrawn.

On October 7, 1987, F.B.I. Special Agents Clarence Joe Tucker and Gary Morgan interviewed Evans at his office. Evans was

informed that the agents wished to ask him about campaign contributions he had received from developers. Evans told agents that Cormany had given him a campaign contribution of $1,000 and that all of the contributions he received from individuals were reflected on his campaign disclosure reports. Evans failed to mention the additional $7,000 in cash that he had received from Cormany.

Testimony at trial indicated that at the end of his campaign, Evans had a surplus of over $7,000, including the money that he had received from Cormany.[2] He testified that he used $4,100 to repay a campaign debt to his mother, in cash, in November of 1986. He testified that he used the remaining $2,900 to repay himself in December of 1986, for loans that he had made to his own campaign over the years 1982–86. Evans became aware of the undercover investigation in November of 1987. The repayments of loans occurred before Evans became aware of the undercover operation. Evans did not, however, record these payments in his books or amend his state disclosure forms until after he knew that he was under investigation.

DISCUSSION

A. Instruction to the Jury on the Law of Extortion under Color of Official Right

[1] Evans claims that the district court's instruction to the jury on Count I, extortion "under color of official right," was erroneous in that it did not require the jury to find that Evans *conditioned* his support for Cormany's project on the receipt of some type of payment from Cormany. In other words, Evans claims that the crime of extortion under color of official right requires that a public official initiate some action which induces the victim to part with money or property. Upon review of the charge given to the jury, we find that it correctly sets out Eleventh Circuit law on the elements required for conviction of the crime of extortion under color of official right.

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part that "whoever ... affects commerce ... by ... extortion shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

In this case, the judge instructed the jury as follows:

> The defendant can be found guilty of [18 U.S.C. § 1951] only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.
>
> Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.
>
> Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.
>
> So, if a public official *agrees* to take or withhold official action or [sic] the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.
>
> . . . . . .
>
> The defendant contends that the $8,000 he received from Agent Cormany was a

2. Although Evans had spent almost $7,000 more than the $14,000 projected budget for June 30 to August 12 that he showed Cormany, he had also raised approximately $28,000 ($14,000 more than expected), including the cash contributed by Cormany.

> campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or *accepts* money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

(emphasis added).

Evans's first contention is that the court erred in using the words "agrees" and "accepts" italicized above. He points out that the Eleventh Circuit Pattern Jury Instruction states that "if a public official *threatens* to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a *threat* would constitute extortion...." Evans claims that the distinction between "threaten" and "agree" is a crucial one: the former, he contends, is a "condition precedent" whereas the latter implies "mere acquiescence." Evans argues that the instruction given by the judge was impermissibly "watered down" because a section 1951 violation requires that the payment of money be induced, i.e. that the defendant condition the performance of some official act on payment of money. He states that the overall charge in this case eliminated the requirement of inducement.

We agree with Evans's observation that the charge permitted the jury to convict Evans without finding that he conditioned the performance of an official act upon payment of money. Under the law of this circuit, however, passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.[3]

Eleventh Circuit law governing the crime of extortion under color of official right was first set out by the former Fifth Circuit in *United States v. Williams*, 621 F.2d 123 (5th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981).[4] In *Williams*, the court stated that:

> The language, "under color of official right," is consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color of his office, with no proof of threat, force or duress required. The coercive element is supplied by the existence of the public office itself.

Id. at 124 (citations omitted).

Evans argues that the Eleventh Circuit decision of *United States v. O'Malley*, 707 F.2d 1240 (11th Cir.1983) stands for the proposition that inducement is still required in a case involving extortion under color of official right. We agree that *O'Malley* speaks in terms of inducement, but note that the decision makes clear that the requirement of inducement is *automatically* satisfied by the power connected with the public office.[5] Therefore, once the defendant has shown that a public official has

3. This is also the law of the majority of circuits that have addressed the question. *See United States v. Aguon*, 851 F.2d 1158, 1177 (9th Cir. 1988) (en banc) (Wallace, J. dissenting) (collecting cases). It will remain the law of the Eleventh Circuit unless the Supreme Court or the Eleventh Circuit sitting en banc decides otherwise. Only the Second and Ninth Circuits have required an act of inducement by a public official. *See United States v. O'Grady*, 742 F.2d 682, 687–89 (2d Cir.1984) (en banc) and *Aguon*, 851 F.2d 1158.

4. The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

5. It appears somewhat academic to argue whether inducement is still required if inducement is automatically present by virtue of the official's position. A condition that is always satisfied ceases to be a true condition.

accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." *Id.* at 1248; *see also United States v. Glass*, 709 F.2d 669, 674 (11th Cir.1983) (coercive nature of official office takes the place of fear, duress, or threat).

In *United States v. O'Keefe*, this circuit reiterated that "[i]n a Hobbs Act prosecution of a public official, the Government's burden is simple: it must prove that the public official obtained property from another in exchange for performance of his official duties." 825 F.2d 314, 319 (11th Cir.1987); *see also United States v. Sorrow*, 732 F.2d 176, 179 (11th Cir.1984) (compulsion not a necessary element in Hobbs Act prosecution of a public official); *United States v. Swift*, 732 F.2d 878, 880 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 905, 83 L.Ed.2d 920 (1985) (same).[6]

Evans, while acknowledging that the Fifth Circuit's decision in *United States v. Dozier*, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982), is not binding on this court, relies heavily on that decision for the proposition that extortion under color of official right requires that a public official make performance or non-performance of an official act contingent upon the payment of a fee. While this accurately described the conduct at issue in *Dozier*, that court made clear that the Hobbs Act was not limited to such behavior, but that:

> [i]t matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.

672 F.2d at 539 (quoting *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir.1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1562, 43 L.Ed.2d 775 (1975)); *see also United States v. Westmoreland*, 841 F.2d 572, 581 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988) (citing *Dozier* and reiterating that a public official may violate the Hobbs Act merely by accepting money in return for a requested exercise of official power); *United States v. Wright*, 797 F.2d 245, 250 (5th Cir.1986), *cert. denied*, 481 U.S. 1013, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987) (same). Thus, despite Evans's protestations otherwise, we find the Fifth Circuit's position stemming from its interpretations of the *Williams* decision entirely consistent with that of the Eleventh.

[2] As an alternative argument, Evans requests that this panel revisit the Eleventh Circuit position on extortion under color of official right, suggesting that the circuit's holdings do not comport with the legislative history and plain meaning of the statute, and that Eleventh Circuit precedents such as *O'Keefe* and *O'Malley* conflict and cannot be reconciled. We see no inconsistency in Eleventh Circuit precedent on this question and further note that prior decisions of panels of the Eleventh Circuit may only be overruled by the *en banc* court or the Supreme Court. *See United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986).

[3, 4] Evans also contends that the instruction was "so confusing, contradictory and ambiguous" that it deprived him of a fair trial. Specifically, he argues that the charge as given did not provide a clear statement regarding the mens rea required by Evans in that it appeared to focus on the actions and intention of the contributor instead of on the actions and intention of the defendant. He states that the charge

6. The Seventh Circuit, in a case cited with approval in *Sorrow*, 732 F.2d at 180 and in *Swift*, 732 F.2d at 880, upheld a trial court instruction that "[i]f the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient." *United States v. Hedman*, 630 F.2d 1184, 1194 n. 4 (7th Cir.1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981). The Seventh Circuit found that the instruction was not erroneous, stating that "it is unnecessary to show that the defendant induced the extortionate payment." *Id.* at 1195.

would allow the jury to convict regardless of whether Evans knew that Cormany's motivation for giving him the money was an improper one.

In order to secure a conviction under the Hobbs Act, the government must demonstrate, among other things, that the public official *knew* that the payment he received was motivated by a hope of influence. We agree with Evans that the charge given by the court did not express this requirement as clearly as it might have.[7] The court did state, however, that the public official must agree to take official action "for the *wrongful purpose* of inducing a victim to part with property." (emphasis added). Further, the instruction on Count I informed the jury of the mens rea required by stating that the government must prove beyond a reasonable doubt "that the defendant induced the person ... to part with property ... knowingly and willfully by means of extortion...."[8]

The district court has broad discretion in formulating the charge to the jury, and the court of appeals will not reverse "unless, after examining the entire charge, the Court finds that the issues of law were presented inaccurately, ... or the charge improperly guided the jury in such a substantial way as to violate due process." *United States v. Turner*, 871 F.2d 1574, 1578 (11th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989). In this case, we find that, taken as a whole, the charge given by the trial judge properly guided the jury and did not offend due process.

B. *Admission of the Government Chart into Evidence*

[5–7] Evans claims that the district court erred in admitting a government chart and foundation testimony into evidence that purported to summarize the defendant's finances. The standard regarding determinations of admissibility of evidence is whether there is a clear showing of an abuse of discretion. *United States v. Roper*, 874 F.2d 782, 790 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 369, 107 L.Ed.2d 355 (1989). For the reasons discussed below, we find that the district court acted well within its discretion in admitting the Robertson chart and the accompanying foundation testimony.

At trial, Thomas Huhn, a private investigator, testified as a summary witness for the defense. Huhn stated that he had examined Evans's ledger books, which comprised Evans's office and campaign record keeping system from 1982 to 1987, in order to determine how much money Evans had personally loaned to his campaign or district office and what repayments were made from the office or campaign back to Evans. On the basis of this examination, Huhn prepared a chart ("the Huhn chart"), which was admitted into evidence. Testifying from this chart, Huhn stated that after Evans had repaid himself $2,900 from the Cormany cash, the campaign and district office still owed Evans approximately $1,235 as of December 31, 1987.[9]

The apparent point of Huhn's testimony and chart was to demonstrate that Evans did not report the $7,000 he received from Cormany on his income tax returns because any money Evans had been repaid for his own loans to his office would not be income and therefore would not have to be reported to the I.R.S.[10]

Prior to Huhn's testimony, Evans had testified that DeKalb County paid each

7. In *Hedman*, 630 F.2d at 1184 n. 4, the jury was specifically told that they could only convict "[i]f the public official knows the motivation of the victim focuse[d] on the public official's office." *See also United States v. Nedza*, 880 F.2d 896, 902 n. 13 (7th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 334, 107 L.Ed.2d 323 (1989). Such an instruction more clearly spells out the mens rea required than the instruction given in this case.

8. The court further instructed the jury on the meaning of the words knowingly and willfully.

9. Huhn testified that there were approximately 376 entries for loans from Evans to the campaign and district office and a total of 44 repayments from the campaign and district office to Evans.

10. The court charged the jury that "if you find that the money the defendant received from Cormany was a campaign contribution and that

commissioner, including Evans, $100 per month for incidental expenses such as parking fees, gas, mileage, lunches, etc. The County did not require the commissioners to designate how this expense money was used. Evans testified that he had not reflected these $100 per month payments from DeKalb County in his office ledger. Instead, he deposited the checks for $100 in his personal account, and he claimed the resulting income of $1,200 per year on his tax return each year as business reimbursements for car related expenses.

In its rebuttal case, the government introduced testimony from Ted Malcolm Robertson, a special agent with the I.R.S. Robertson testified that, in his opinion, the $100 per month that Evans had received during the period 1982 to 1987 should have been reflected in his ledgers in order to arrive at an accurate assessment of the amounts owed to or owing from Evans to his campaign and district office. Robertson stated that he had concluded that every item that had been expensed on behalf of Evans was reflected in Evans's ledger books, including expenses for transportation.[11] Robertson testified that he had made a summary chart ("the Robertson chart") which adopted the figures in the Huhn chart, but added in the $100 per month that Evans had received from DeKalb County. On the basis of this chart, Robertson testified that as of December 31, 1987, Evans actually owed his campaign and district office over $4,700.

According to the government, the Robertson chart was introduced to rebut Evans's reasons for not reporting the money to the I.R.S. by showing that Evans could not have believed that he was merely repaying himself a debt. The government sought to show that at the time Evans repaid himself, he was not owed any money from his district and campaign office.

Evans objected to Robertson's testimony and to the Robertson chart on several grounds. He claimed that the chart was irrelevant, erroneous, and argumentative, that it did not meet the requirements of Fed.R.Evid. 1006, and that it resulted in a variance as to Count II of the indictment. The district court overruled Evans's objections to the testimony and the chart as well as Evans's motion for a mistrial based on his variance argument.

Evans claims that the Robertson chart was irrelevant because the $100 per month expense money given to each Commissioner by DeKalb County had nothing to do with Evans's office or campaign records or accounts. He claims that the chart was erroneous because the government was allowed to insert the $100 per month payments into Evans's bookkeeping system for his office without taking into account any of the expenses for which the money was used. Evans argues strenuously that the record demonstrates that he used the $100 per month for car expenses and that he accordingly expensed the $100 per month on I.R.S. form 2106 as an employee business expense. He points out that the evidence showed that he did not claim depreciation, mileage, insurance, gasoline, oil or other expenses on his cars from his campaign and district office account, and that Robertson himself admitted on cross examination that he had not found a single charge in the campaign and district office records for such expenses for any car driven by either Evans or his wife, who served as his campaign manager. Evans claims that as a result of Robertson's testimony, the jury was erroneously led to believe that Evans had repaid himself $6,000 more from his office and campaign loans than was the case.

Finally, Evans claims that the chart was argumentative because the government labeled the DeKalb County money "*re* payments" to Evans to make it correspond to the other repayments Evans received for his loans to his campaign and district office, even though there was evidence that the money was not used in this manner.

it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return."

11. Evans had testified that among the items that he included as loans from himself to the campaign were items for car expenses such as gasoline and related matters.

He argues that he had demonstrated that the DeKalb County money was not a repayment but rather an advance for routine expense payments.

We agree with Evans that the testimony by Robertson was contradicted by other evidence at trial. We find, however, that this does not render the admission of the government's evidence irrelevant or erroneous. In an adversarial proceeding, it is not unusual for testimony offered by one side to be contradicted by testimony offered by the opposing side.[12] Here, the jury was presented with the evidence of both sides and was allowed to draw its own conclusions as to whether the $1,200 per year should have been added to the defendant's summary of the repayments made to himself from his campaign and district office. Evans had the opportunity, through cross examination and surrebuttal,[13] to demonstrate that the government's theory was false. The fact that the government tenders unpersuasive evidence does not mean that the admission of evidence was error. Indeed, trial counsel may have been able to turn the tables on the government by showing that the government was putting forth a theory that lacked foundation.

Evans also argues that the chart was not a "summary" within the meaning of Fed.R. Evid. 1006[14] because the DeKalb County payments were not so voluminous that they could not conveniently be examined in court.

Evans is constrained to argue only that the *additional* payments of $1,200 were not a "summary" because, of course, the chart, minus those payments, had already been admitted as a summary chart during presentation of the defense. We find that the district court did not abuse its discretion in admitting the chart as a summary, as it brought together a total of sixty $100 per month payments that Evans received over a five year period.

Finally, Evans argues that the testimony of Agent Robertson set forth an impermissible variance from the charge and the proof. Robertson testified, based on the chart, that when the DeKalb County payments were included, Evans had already taken over $1,100 of undeclared income without regard to what he did with $2,900 from the cash given to him by Cormany. Evans claims that if this evidence were accurate, the jury could believe Evans's testimony as to what he did with the Cormany cash and still convict him.

In *Stirone v. United States*, 361 U.S. 212, 215–16, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960), the Supreme Court stated that the grand jury's charges may not be broadened through amendment except by the grand jury itself. We conclude that *Stirone* has no bearing on the case before us, as it speaks to the situation in which the trial court gives an instruction which expands the jury charge to include additional illegal acts not charged in the indictment. In the instant case, the judge specifically instructed the jury that "the defendant is not on trial for any other specific offense not charged in the indictment."[15]

from DeKalb County to defray his expenses. Counsel then decided not to proceed with any surrebuttal.

14. Fed.R.Evid. 1006 states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

15. Count II of the indictment charged in relevant part that Evans filed a tax return "he did not believe to be true and correct as to every

In *United States v. Gold*, 743 F.2d 800 (11th Cir.1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985), we made clear that "properly understood ... a variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegation." *Id.* at 813 (emphasis in original); *see also United States v. Champion*, 813 F.2d 1154, 1168 (11th Cir. 1987) (government's evidence related to uncharged shipments of marijuana during time of indicted conspiracy did not constitute impermissible variance from the indictment). Here, there was no variance warranting a mistrial and the district court properly denied the motion.

C. Refusal to give an Entrapment Charge on the Tax Fraud Count

[8, 9] Evans claims that the district court erred in refusing to charge the jury on entrapment with respect to Count II of the indictment, which charged Evans with subscribing to a false tax return for 1986.[16]

A defendant is entitled to have presented instructions relating to a theory of defense "for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir.1986) (quoting *United States v. Young*, 464 F.2d 160, 164 (5th Cir.1972) (emphasis added)). In order to raise the issue of entrapment, a defendant must come forward with some evidence that "the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it." *United States v. Parr*, 716 F.2d 796, 802–03 (11th Cir.1983) (citations omitted); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir.1985), *cert. denied*, 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed.2d 789 (1986). Therefore, in reviewing a district court's failure to instruct the jury on a theory of entrapment, we look to see whether the court correctly concluded that the defendant failed to present more than a scintilla of evidence in support of an entrapment defense.

Evans first contends that the evidence that was sufficient to authorize the entrapment charge on the extortion count (Count I) would also authorize it on the count of failure to report $7,000 as income (Count II). Evans's argument appears to be that when he was entrapped into extorting the money, he was simultaneously entrapped into not recording $7,000 of it as a campaign contribution. He goes on to argue that once he decided not to record that money as a campaign contribution, he was "logically" foreclosed from disclosing it to the I.R.S. We find this argument, though creative, to be without merit. First, while there may be evidence sufficient to support a charge of entrapment on the general offense of extortion, there is no evidence that the government played any role in Evans's decision, after receiving the $8,000, to record only $1,000 as a campaign contribution. Even if such evidence existed, Evans's subsequent decision not to declare the additional $7,000 on his income tax form was wholly separate from his decision not to record it in his campaign ledgers. Thus, we find that the giving of an entrapment charge on Count I in no way required the court to give an entrapment charge on Count II.

Evans also argues that his entrapment defense is supported by the transcript of his July 24, 1986, meeting with Cormany at which Cormany requested that the payment not be disclosed. Evans contends that when he responded that he would not disclose the $7,000, he "clearly signaled his future intention with regard to disclosure to the I.R.S."

We need not reach the question of whether a mere request by a government agent not to disclose money to the I.R.S.

material matter in that ... the Evans's adjusted gross income in 1986 was at least $35,739.67 *as a result of a $7,000 cash payment he received from Clifford Cormany a/k/a Steve Hawkins.*" (emphasis added).

16. An entrapment charge was given on Count I.

would provide a sufficient basis for an entrapment charge, for our review of the transcript and the videotape convinces us that Cormany made no such request.[17] Although Cormany requested that Evans not inform anyone of the transaction, at no point did Cormany suggest or request that Evans not report the money to the I.R.S. in his tax return. Thus, there is no basis to conclude that Cormany's request for confidentiality "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *Parr*, 716 F.2d at 802–03. We hold that the district court correctly ruled that Evans's showing of entrapment was insufficient as a matter of law to send the issue to the jury and that it did not err in refusing to give an entrapment charge with respect to Count II.

D. Exclusion of Testimony by Dr. Robert Shuy

[10, 11] Evans's final claims concern two evidentiary rulings by the district court limiting the evidence that the defense was allowed to put before the jury.

First, Evans argues that the district court abused its discretion in refusing to permit the defense expert on linguistics, Dr. Roger W. Shuy, to assist the jury in examining in court the eighteen tapes admitted into evidence. Dr. Shuy was presented as an expert in the field of conversation or discourse analysis. The defense offered Dr. Shuy to testify about the structure of conversation including such concepts as "topic isolation," "response analysis," "feedback markers," and the "contamination principle."[18] The defense also sought to introduce, pursuant to Fed. R.Evid. 1006, five charts showing Dr. Shuy's conclusions about certain "themes" that recurred throughout the conversations. The court ruled that Dr. Shuy would not be permitted to testify.

Evans claims that the testimony would have helped the jury determine whether it was more or less probable that Evans understood the illegal nature of the plan through reference to specific taped conversations. As far as the summary was concerned, Evans argues that the only way to review multiple and lengthy tape sequences is by means of a chart or summary. He notes that the expert was able to listen to the tapes repeatedly, whereas the jury heard the tapes only once at trial. He argues that the summary charts, which dealt with broader themes over a period of time, could only be assembled after an extensive review that no jury would have the ability to undertake.[19]

17. The transcript of the conversation, in relevant part, was as follows:

Cormany: Okay. Now this, listen, when I say this is between you and I ...
Evans: Okay.
Cormany: ... John, let me tell you something, I mean ...
Evans: Won't say a word
Cormany: I don't mean Al [Johnson], I mean, I prefer to have it that way. Not that I don't trust Al.
Evans: Period. No, no, no.
Cormany: And, and ...
Evans: Period.
Cormany: Bob [Howard] don't need to know.
Evans: Nobody.
Cormany: Okay?
Evans: You can count on it.
...
Cormany: I just saw, ah, Al show up, so this ...
Evans: Oh.
Cormany: ... This is between you and I.
Evans: No problem.
Cormany: Then, I mean. My accountant will find out I made a thousand dollar contribution from my check book.
Evans: Yeah, fine, fine.
Cormany: We got so much, so many different accounts and everything, I mean, you know ...
Evans: (Laughs)
Cormany: He won't, he won't even miss the rest of it.

18. At the trial court's evidentiary hearing on the proffer of this evidence, Dr. Shuy testified that "topic analysis" refers to identification of the major themes of the speakers in the conversation which indicate the agenda of the speakers, that "feedback markers" are responses such as "Uh huh" which may or may not mean "I agree with what the speaker is saying," and that the "contamination principle" is the process by which a listener becomes contaminated in the eyes of a third party listener/observer by the actions of the speaker.

19. As an example, he notes that a summary would have demonstrated that Cormany or Al

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence.[20] Under this rule, prior to admitting expert testimony, "the trial judge must determine that the expert testimony will be relevant and will be helpful to the trier of fact." *United States v. Piccinonna*, 885 F.2d 1529, 1531 (11th Cir.1989) (en banc) (footnotes omitted). We have stressed that, in deciding whether to admit testimony, "a trial judge must be sensitive to the jury's temptation to allow the judgment of another authority to substitute for its own." *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988).

In this case, the district court held an extensive evidentiary hearing regarding the defendant's proffer of Dr. Shuy's testimony. In deciding not to admit the testimony, the court concluded that while a jury in an appropriate case might be aided by testimony from a linguistic expert, the case at bar was not appropriate for such testimony. The court based this conclusion on several grounds. First, it noted that the recordings and transcripts that formed the basis of Dr. Shuy's conclusions were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. The court also found that the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors. Finally, the court found that the testimony could be confusing and misleading to the jurors because it took matters out of context and, in some instances, was in the nature of conclusions regarding the appropriate interpretations to make of the recorded conversations.

We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony. In considering whether the expert would aid the jury's ability to understand the taped conversations and whether the danger of jury confusion outweighed the testimony's probative value, the court engaged in the correct inquiry. *Cf. United States v. Schmidt*, 711 F.2d 595, 598 (5th Cir.1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 705, 79 L.Ed.2d 169 (1984) (refusal to admit expert testimony of linguistics expert not an abuse of discretion where court concluded that testimony would not assist jury); *United States v. Devine*, 787 F.2d 1086, 1088 (7th Cir.), *cert. denied*, 479 U.S. 848, 107 S.Ct. 170, 93 L.Ed.2d 107 (1986) (not error to refuse to admit linguist's testimony where contents of tape recorded conversation not outside the average person's understanding); *United States v. DeLuna*, 763 F.2d 897, 912 (8th Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (no error to refuse proffered expert testimony on discourse analysis). Further, our review of the evidentiary hearing on the admissibility of the expert testimony convinces us that the district court's findings on these matters were well supported. In this case, questions regarding the defendant's understanding of the illegality of the operation and the extent of government inducement were at the center of the trial. The jury's task was to determine, on the basis of its collective experience and judgment, what Evans's state of mind was when he accepted the money and whether he was entrapped into committing the crime for which he was charged. We agree with the district court that expert testimony would not have aided the jury in performing this task and that the testimony presented a risk that the jury would allow the judgment of the expert to substitute for its own.

In refusing to admit the expert's charts as a summary pursuant to Fed.R.Evid. 1006, the court found that certain of the headings of the charts impermissibly reflected the expert's opinion as to the content of the recorded testimony that had previously been presented to the jury. We

Johnson offered Evans money at thirty different times over the course of the investigation.

20. Fed.R.Evid. 702 states:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

hold that the district court did not abuse its discretion in refusing to admit the proffered charts on this basis, as a summary of the tapes would necessarily entail judgments about the content of the conversations.

E. Refusal to Allow Cross-Examination of Agent Cormany on the Attorney General's Guidelines on F.B.I. Undercover Operations

[12] Evans also claims that the district court abused its discretion in prohibiting cross-examination of Agent Cormany on the Attorney General's internal guidelines on F.B.I. undercover operations. Evans argues that such an examination would have aided the jury in deciding whether he was entrapped, as it would have shown the degree to which the F.B.I. strayed from the regulations that should have governed its conduct. He argues that the guidelines provide standards to assist the jury in evaluating whether or not the government adhered to minimum standards of fairness.

Evans admits that this is not a case where an agency is required to adhere to its own regulations under penalty of having its actions nullified. *Cf. United States v. Pacheco-Ortiz*, 889 F.2d 301, 307-11 (1st Cir.1989) (discussing judicial sanctions for Department of Justice's failure to follow internal guidelines regarding warnings to targets called before the grand jury). He argues, however, that the government should not be permitted to conceal from the jury the F.B.I.'s violation of its own rules in an effort to snare a citizen.

We conclude that these guidelines were not of sufficient relevance to the jury's determination on the question of entrapment to warrant their admission. The defense of entrapment concerns only the defendant's lack of predisposition to commit the crime. "Where a defendant is predisposed to commit a crime, he cannot be entrapped, regardless of how outrageous or overreaching the government's conduct may be." *United States v. Rey*, 811 F.2d 1453, 1455 (11th Cir.), *cert. denied*, 484 U.S. 830, 108 S.Ct. 103, 98 L.Ed.2d 63 (1987) (*citing Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976)). Given the guidelines' lack of probative value on the issue of entrapment, we hold that the district court's decision to disallow cross-examination was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the defendant's convictions on both counts of the indictment are AFFIRMED.

CONSOLIDATED ALUMINUM CORPORATION, Plaintiff/Appellant,

v.

FOSECO INTERNATIONAL LIMITED, Foseco Incorporated, Alumax Incorporated and Trialco Incorporated, Defendants/Cross-Appellants.

Nos. 89-1637, 89-1643.

United States Court of Appeals, Federal Circuit.

July 19, 1990.

Holder of patents for ceramic foam filters for molten metal brought action against alleged infringers, and alleged infringers counter-claimed stating violation of Sherman Act. The United States District Court for the Northern District of Illinois, Will, J., 716 F.Supp. 316, held patents unenforceable and invalid and denied alleged infringer's motion for attorney fees. Appeal and cross appeal were taken. The Court of Appeals, Markey, Circuit Judge, held that: (1) failure to disclose best mode of practicing patent and disclosure of fictitious inoperable mode warranted finding patent unenforceable under doctrine of unclean hands; (2) inequitable conduct in procuring one patent rendered related patents unenforceable; and (3) trial court did not abuse its discretion in finding that ac-

ORIGINAL

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

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By: [signature] Deputy Clerk

No. 89-8631

D.C. Docket No. CR88-269A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN H. EVANS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby AFFIRMED.

Entered: September 6, 1990
For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

A TRUE COPY - ATTESTED
CLERK, U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
BY: [signature]
DEPUTY CLERK
ATLANTA, GEORGIA

ISSUED AS MANDATE: SEP 28 1990

(JURY ABSENT.)

THE COURT: ALL RIGHT. LET EVERYONE COME IN WHO'S COMING IN. IF YOU'RE GOING OUT, YOU HAVE TO GO OUT BEFORE I START.

MR. ABBOTT: JUDGE, MAY I GET MR. LOTITO?

THE COURT: WE ARE GOING TO HAVE TO TIE YOU ALL DOWN TO YOUR SEATS.

(LAUGHTER.)

THE COURT: ALL RIGHT. I'M GOING TO CHARGE THE JURY. THE LIKELIHOOD IS GOOD I WILL SEND THE WRITTEN CHARGE OUT WITH THE JURY.

OKAY. BRING THE JURY IN, MR. JONES.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: ALL RIGHT, MEMBERS OF THE JURY, IF YOU WOULD KINDLY GIVE ME YOUR ATTENTION. IT NOW BECOMES THE DUTY OF THE JUDGE TO INSTRUCT YOU ON THE RULES OF LAW THAT YOU MUST FOLLOW AND APPLY IN DECIDING THIS CASE.

WHEN I HAVE FINISHED, YOU WILL GO TO THE JURY ROOM AND BEGIN YOUR DISCUSSIONS, WHAT WE SOMETIMES CALL DELIBERATIONS. IT WILL BE YOUR DUTY TO DECIDE WHETHER THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT THE SPECIFIC FACTS NECESSARY TO FIND THE DEFENDANT GUILTY OF THE CRIMES CHARGED IN THE INDICTMENT.

NOW THAT YOU HAVE HEARD ALL OF THE EVIDENCE AND THE ARGUMENT OF COUNSEL, IT BECOMES THE DUTY OF THE JUDGE TO GIVE YOU THE INSTRUCTIONS OF THE COURT CONCERNING THE LAW APPLICABLE TO THE CASE.

YOU MUST MAKE YOUR DECISION ONLY ON THE BASIS OF THE TESTIMONY AND OTHER EVIDENCE PRESENTED HERE DURING THE TRIAL. YOU MUST NOT BE INFLUENCED IN ANY WAY BY EITHER SYMPATHY OR PREJUDICE FOR OR AGAINST THE DEFENDANT OR THE GOVERNMENT.

YOU MUST ALSO FOLLOW THE LAW AS I EXPLAIN IT TO YOU, WHETHER YOU AGREE WITH THE LAW OR NOT, AND YOU MUST FOLLOW ALL OF MY INSTRUCTIONS AS A WHOLE. YOU MAY NOT SINGLE OUT ONE OR DISREGARD ANY OF THE COURT'S INSTRUCTIONS ON THE LAW.

AS STATED TO YOU EARLIER, THE INDICTMENT OR FORMAL CHARGE BY WHICH THIS CASE CAME TO THIS COURT AGAINST THE DEFENDANT IS NOT EVIDENCE OF GUILT AND MAY NOT BE CONSIDERED AS EVIDENCE OF GUILT.

I CHARGE YOU THAT THE DEFENDANT HAS COME INTO COURT AND PLED NOT GUILTY TO EACH OF THE CHARGES. THE EFFECT OF HIS PLEADING NOT GUILTY HAS PLACED THE BURDEN ON THE GOVERNMENT OF PROVING EACH ELEMENT AND EACH OFFENSE CHARGED BEYOND A REASONABLE DOUBT.

THE DEFENDANT IS PRESUMED BY THE LAW TO BE INNOCENT. THE LAW DOES NOT REQUIRE A DEFENDANT TO

PROVE HIS INNOCENCE OR PRODUCE ANY EVIDENCE AT ALL.

THE GOVERNMENT HAS THE BURDEN OF PROVING A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT; AND IF IT FAILS TO DO SO, YOU MUST FIND THE DEFENDANT NOT GUILTY.

THUS, WHILE THE GOVERNMENT'S BURDEN OF PROOF IS A STRICT OR HEAVY BURDEN, IT IS NOT NECESSARY THAT THE DEFENDANT'S GUILT BE PROVED BEYOND ALL POSSIBLE DOUBT. IT IS ONLY REQUIRED THAT THE GOVERNMENT'S PROOF EXCLUDE ANY REASONABLE DOUBT CONCERNING THE DEFENDANT'S GUILT.

A REASONABLE DOUBT IS A REAL DOUBT, BASED UPON REASON AND COMMON SENSE, AFTER CAREFUL AND IMPARTIAL CONSIDERATION OF ALL THE EVIDENCE IN THE CASE.

PROOF BEYOND A REASONABLE DOUBT, THEREFORE, IS PROOF OF SUCH A CONVINCING CHARACTER THAT YOU WOULD BE WILLING TO RELY AND ACT UPON IT WITHOUT HESITATION IN THE MOST IMPORTANT OF YOUR OWN AFFAIRS.

IF YOU ARE CONVINCED THAT THE DEFENDANT HAS BEEN PROVEN GUILTY BEYOND A REASONABLE DOUBT, SAY SO. IF YOU ARE NOT CONVINCED, SAY SO.

AS STATED EARLIER, YOU MUST CONSIDER ONLY THE EVIDENCE I HAVE ADMITTED IN THE CASE. THE TERM EVIDENCE INCLUDES THE TESTIMONY OF THE WITNESSES AND

THE EXHIBITS ADMITTED INTO THE RECORD.

REMEMBER THAT ANYTHING THE LAWYERS SAY IS NOT EVIDENCE IN THE CASE. IT IS YOUR OWN RECOLLECTION AND INTERPRETATION OF THE EVIDENCE THAT CONTROLS. WHAT THE LAWYERS SAY IS NOT BINDING UPON YOU.

ALSO, YOU SHOULD NOT ASSUME FROM ANYTHING I MAY HAVE SAID THAT I HAVE ANY OPINION CONCERNING ANY OF THE ISSUES IN THE CASE. EXCEPT FOR MY INSTRUCTIONS TO YOU ON THE LAW, YOU SHOULD DISREGARD ANYTHING I HAVE SAID DURING THE TRIAL IN ARRIVING AT YOUR OWN DECISION CONCERNING THE FACTS.

CONCERNING THE EVIDENCE, YOU MAY MAKE DEDUCTIONS AND REACH CONCLUSIONS WHICH REASON AND COMMON SENSE LEAD YOU TO MAKE, AND YOU SHOULD NOT BE CONCERNED ABOUT WHETHER THE EVIDENCE IS DIRECT OR CIRCUMSTANTIAL.

DIRECT EVIDENCE IS THE EVIDENCE -- DIRECT EVIDENCE IS THE TESTIMONY OF ONE WHO ASSERTS ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN EYEWITNESS.

CIRCUMSTANTIAL EVIDENCE IS THE PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THAT THE DEFENDANT IS EITHER GUILTY OR NOT GUILTY.

THE LAW MAKES NO DISTINCTION BETWEEN THE WEIGHT YOU MAY GIVE TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE.

NOW, IN SAYING THAT YOU MUST CONSIDER ALL THE EVIDENCE, I DO NOT MEAN THAT YOU MUST ACCEPT ALL OF THE EVIDENCE AS TRUE OR ACCURATE. YOU SHOULD DECIDE WHETHER YOU BELIEVE WHAT EACH WITNESS HAS HAD TO SAY AND HOW IMPORTANT THAT TESTIMONY WAS.

IN MAKING THAT DECISION, YOU MAY BELIEVE OR DISBELIEVE ANY WITNESS IN WHOLE OR IN PART. ALSO, THE NUMBER OF WITNESSES TESTIFYING CONCERNING ANY PARTICULAR DISPUTE IS NOT CONTROLLING.

YOU MAY DECIDE THAT THE TESTIMONY OF A SMALLER NUMBER OF WITNESSES CONCERNING ANY FACT IN DISPUTE IS MORE BELIEVABLE THAN THE TESTIMONY OF A LARGER NUMBER OF WITNESSES TO THE CONTRARY.

IN DECIDING WHETHER YOU BELIEVE OR DO NOT BELIEVE ANY WITNESS, I SUGGEST THAT YOU ASK YOURSELF A FEW QUESTIONS: DID THE PERSON IMPRESS YOU AS ONE WHO WAS TELLING THE TRUTH? DID HE OR SHE HAVE A PERSONAL INTEREST IN THE OUTCOME OF THE CASE? DID THE WITNESS SEEM TO HAVE A GOOD MEMORY? DID THE WITNESS HAVE THE OPPORTUNITY AND ABILITY TO OBSERVE ACCURATELY THE THINGS ABOUT WHICH HE OR SHE TESTIFIED? DID HE OR SHE APPEAR TO UNDERSTAND THE QUESTIONS CLEARLY AND ANSWER THEM DIRECTLY? DID THE WITNESS' TESTIMONY DIFFER FROM THE TESTIMONY OF OTHER WITNESSES?

YOU MAY ALSO ASK YOURSELF WHETHER THERE WAS

EVIDENCE TENDING TO PROVE THAT THE WITNESS TESTIFIED FALSELY CONCERNING SOME IMPORTANT FACT, OR WHETHER THERE WAS EVIDENCE THAT AT SOME OTHER TIME THE WITNESS SAID OR DID SOMETHING, OR FAILED TO SAY OR DO SOMETHING, WHICH WAS DIFFERENT FROM THE TESTIMONY WHICH HE OR SHE GAVE BEFORE YOU DURING THE TRIAL.

YOU SHOULD KEEP IN MIND, OF COURSE, THAT A SIMPLE MISTAKE BY A WITNESS DOES NOT NECESSARILY MEAN THAT THE WITNESS WAS NOT TELLING THE TRUTH AS HE OR SHE REMEMBERED IT, BECAUSE PEOPLE NATURALLY TEND TO FORGET SOME THINGS OR REMEMBER OTHER THINGS INACCURATELY.

SO, IF A WITNESS HAD MADE A MISSTATEMENT, YOU NEED TO CONSIDER WHETHER THAT MISSTATEMENT WAS SIMPLY AN INNOCENT LAPSE OF MEMORY OR AN INTENTIONAL FALSEHOOD. THAT MAY DEPEND UPON WHETHER IT HAS TO DO WITH AN IMPORTANT FACT OR WITH SOME -- OR ONLY WITH AN UNIMPORTANT DETAIL.

AS STATED BEFORE, A DEFENDANT HAS A RIGHT NOT TO TESTIFY. IF A DEFENDANT DOES TESTIFY, HOWEVER, YOU SHOULD DECIDE IN THE SAME WAY AS THAT OF ANY OTHER WITNESS WHETHER YOU BELIEVE HIS TESTIMONY.

NOW, LADIES AND GENTLEMEN, DURING THE COURSE OF THE TRIAL, CERTAIN TRANSCRIPTS WERE ADMITTED INTO EVIDENCE. I CHARGE YOU THAT THESE TRANSCRIPTS HAVE

BEEN ADMITTED FOR THE LIMITED AND SECONDARY PURPOSE OF ASSISTING THE JURY IN FOLLOWING THE CONTENT OF CONVERSATIONS AS YOU LISTENED TO THE TAPE RECORDINGS AND ALSO TO HELP YOU IN IDENTIFYING SPEAKERS.

HOWEVER, YOU ARE SPECIFICALLY INSTRUCTED THAT WHETHER THE TRANSCRIPT CORRECTLY REFLECTS -- REFLECT THE CONTENT OF THE CONVERSATION OR THE IDENTITY OF THE SPEAKERS IS ENTIRELY FOR YOU TO DETERMINE.

IF THE JURY SHOULD DETERMINE THAT ANY TRANSCRIPT IS IN ANY RESPECT INCORRECT, YOU SHOULD DISREGARD IT TO THAT EXTENT.

WHEN KNOWLEDGE OF A TECHNICAL SUBJECT MATTER MIGHT BE HELPFUL TO A JURY, A PERSON HAVING SPECIAL TRAINING OR EXPERIENCE IN A TECHNICAL FIELD, ONE WHO IS CALLED AN EXPERT WITNESS, IS PERMITTED TO STATE HIS OR HER OPINION CONCERNING THOSE TECHNICAL MATTERS.

MERELY BECAUSE AN EXPERT WITNESS HAS EXPRESSED AN OPINION, HOWEVER, DOES NOT MEAN THAT YOU MUST ACCEPT THAT OPINION. THE SAME AS ANY OTHER WITNESS, IT IS UP TO YOU TO DECIDE WHETHER TO RELY UPON IT.

IN THIS CASE, AS YOU KNOW, THE INDICTMENT CHARGES TWO SEPARATE OFFENSES, ALSO CALLED COUNTS. NOW, I WILL NOT READ THE INDICTMENT TO YOU AT THIS

TIME BECAUSE YOU WILL BE GIVEN A COPY OF THE INDICTMENT, WHICH WILL BE WITH YOU IN THE JURY ROOM FOR YOU TO CONSIDER AND STUDY DURING YOUR DELIBERATIONS.

IN SUMMARY, COUNT 1 CHARGES THAT THE DEFENDANT WILLFULLY ATTEMPTED TO EXTORT MONEY UNDER COLOR OF OFFICIAL RIGHT AND IN SO DOING TO AFFECT COMMERCE IN VIOLATION OF TITLE 18, UNITED STATES CODE, 19-51.

COUNT 2 CHARGES THAT THE DEFENDANT WILLFULLY MADE AND SIGNED A TAX RETURN WHICH THE DEFENDANT DID NOT BELIEVE TO BE TRUE AND CORRECT AS TO EVERY MATERIAL MATTER IN VIOLATION OF TITLE 26, UNITED STATES CODE, 72-06.

IN A FEW MINUTES, I WILL EXPLAIN IN MORE DETAIL THE ELEMENTS OF THOSE CHARGES.

YOU WILL NOTE THAT THE INDICTMENT CHARGES THAT THE OFFENSE WAS COMMITTED ON OR ABOUT A CERTAIN DATE. THE GOVERNMENT DOES NOT HAVE TO PROVE WITH CERTAINTY THE EXACT DATE OF THE ALLEGED OFFENSE. IT IS SUFFICIENT IF THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT THE OFFENSE WAS COMMITTED ON A DATE REASONABLY NEAR THE DATE ALLEGED.

I WILL NOW READ TO YOU THE DEFENDANT'S THEORY OF THE CASE. NOW, AS I READ TO YOU THE

DEFENDANT'S THEORY OF THE CASE, I WILL BE STATING TO YOU THE CONTENTIONS OF THE DEFENDANT AS PROVIDED TO THE JUDGE, AND NOT STATEMENTS OF THE COURT OR FINDINGS OF THE COURT AS TO ANY FACT IN THIS CASE.

COUNT 1. IN COUNT 1, JOHN EVANS HAS BEEN CHARGED WITH ACCEPTING MONEY UNDER COLOR OF OFFICIAL RIGHT. JOHN EVANS CONTENDS THAT HE ACCEPTED THE MONEY AS A CAMPAIGN CONTRIBUTION. HE FURTHER CONTENDS THAT HE AGREED TO ASSIST STEVE HAWKINS IN AUGUST 1985 PRIOR TO DISCUSSIONS ABOUT THE POSSIBILITY OF A CAMPAIGN CONTRIBUTION BEING MADE.

HE CONTENDS THAT HE AGREED TO SUPPORT HAWKINS' PROJECT BECAUSE HAWKINS AND AL JOHNSON ASKED HIM TO HELP AND REPRESENTED TO EVANS THAT THEIR PROJECT WOULD BE A QUALITY PROJECT, WAS LEGITIMATE, AND WOULD COMPLY WITH ALL REGULATIONS.

MR. EVANS CONTENDS THAT THE ASSISTANCE HE PROVIDED WAS LIMITED TO, ONE, INTRODUCING HAWKINS TO OTHER COMMISSIONERS; TWO, CHECKING TO SEE WHETHER OTHER COMMISSIONERS WOULD SUPPORT HAWKINS' REQUEST THAT THE BOARD OF COMMISSIONERS WAIVE A TWO YEAR WAITING REQUIREMENT, OR ALLOWING HAWKINS TO WITHDRAW HIS ZONING REQUEST WITHOUT PREJUDICE; AND THREE, AGREEING TO SUPPORT HAWKINS' PROJECT HIMSELF BASED ON HAWKINS' REPRESENTATION TO EVANS THAT THE PROJECT

WOULD COMPLY WITH ZONING REGULATIONS AND IS A GOOD PROJECT.

EVANS CONTENDS THAT HIS ACTIVITIES WERE ALL LEGITIMATE ACTIVITIES FOR A COMMISSIONER. EVANS ALSO CONTENDS THAT HE PLACED LIMITS ON ALL SUPPORT NOTING THAT HE WOULD -- THAT HE WOULD IN THE FINAL ANALYSIS DO WHAT WAS PRUDENT UNDER THE CIRCUMSTANCES.

EVANS CONTENDS HE DID NOT ATTEMPT TO INFLUENCE THE VOTE OF OTHER COMMISSIONERS NOR ANYONE ON THE PLANNING COMMISSION, PLANNING DEPARTMENT OR COMMUNITY COUNCIL.

EVANS FURTHER CONTENDS THAT HE REPEATEDLY TOLD HAWKINS THAT HAWKINS NEEDED TO MEET OTHER COMMISSIONERS AS WELL AS CHARLIE COLEMAN OF THE PLANNING DEPARTMENT SO HAWKINS WOULD EXPLAIN -- SO HAWKINS WOULD EXPLAIN THE PROJECT HIMSELF.

EVANS SAYS THAT HE DID NOT SEEK TO HIDE HIS ASSISTANCE AND TOLD HAWKINS TO USE HIS NAME WITH COLEMAN.

EVANS CONTENDS THAT HE NEVER THREATENED TO WITHHOLD HIS SUPPORT IF HE DID NOT RECEIVE A CAMPAIGN CONTRIBUTION; THAT HE WOULD HAVE RENDERED THE SAME ASSISTANCE TO HAWKINS REGARDLESS OF THE SIZE OF ANY CAMPAIGN CONTRIBUTION OR WHETHER HE RECEIVED ANY CAMPAIGN CONTRIBUTION AT ALL.

COUNT 2. IN COUNT 2, JOHN EVANS HAS BEEN CHARGED WITH MAKING A FALSE STATEMENT ON HIS INCOME TAX RETURN IN 1986 BY NOT REPORTING $7,000 IN INCOME -- THIS IS CONTINUING THE DEFENDANT'S CONTENTIONS -- JOHN EVANS CONTENDS THAT THE $7,000 WAS ACCEPTED BY HIM AS A CAMPAIGN CONTRIBUTION, AND THAT HE WAS NOT REQUIRED TO REPORT IT ON HIS INCOME TAX RETURN.

HE CONTENDS FURTHER THAT THE ENTIRE AMOUNT WAS USED TO REPAY A CAMPAIGN DEBT TO HIS MOTHER AND TO PARTIALLY REPAY HIS OWN LOANS TO HIS CAMPAIGN AND DISTRICT OFFICE.

NOW RETURNING TO THE CHARGES, THE ELEMENTS OF THE CHARGES SET FORTH IN THE INDICTMENT. COUNT 1 OF THE INDICTMENT IS BROUGHT UNDER A FEDERAL STATUTE WHICH IS COMMONLY KNOWN AS THE HOBBS ACT. THIS STATUTE, 18 UNITED STATES CODE, SECTION 19-51(A) PROVIDES IN PERTINENT PART AS FOLLOWS: WHOSOEVER IN ANY WAY OR DEGREE OBSTRUCTS, DELAYS OR AFFECTS COMMERCE OR THE MOVEMENT OF ANY ARTICLE OR COMMODITY IN COMMERCE BY ROBBERY OR EXTORTION, OR ATTEMPTS, OR CONSPIRACY TO DO SO SHALL BE GUILTY OF AN OFFENSE AGAINST THE UNITED STATES.

THIS STATUTE MAKES IT A FEDERAL CRIME OR OFFENSE FOR ANYONE TO EXTORT SOMETHING FROM ANYONE ELSE AND IN SO DOING TO INTERFERE WITH INTERSTATE

COMMERCE.

THE DEFENDANT CAN ONLY -- THE DEFENDANT CAN BE FOUND GUILTY OF THAT OFFENSE ONLY IF ALL OF THE FOLLOWING ELEMENTS ARE PROVED BEYOND A REASONABLE DOUBT: FIRST, THAT THE DEFENDANT INDUCED THE PERSON DESCRIBED IN THE INDICTMENT TO PART WITH PROPERTY OR MONEY; SECOND, THAT THE DEFENDANT DID SO KNOWINGLY AND WILLFULLY BY MEANS OF EXTORTION AS HEREINAFTER DEFINED; THIRD, THAT THE EXTORTIONATE TRANSACTION DELAYED, INTERRUPTED OR ADVERSELY AFFECTED INTERSTATE COMMERCE.

NOW, EXTORTION IN A CASE INVOLVING A PUBLIC OFFICIAL MEANS THE WRONGFUL ACQUISITION OF PROPERTY FROM SOMEONE ELSE UNDER COLOR OF OFFICIAL RIGHT.

EXTORTION UNDER COLOR OF OFFICIAL RIGHT IS THE WRONGFUL TAKING BY A PUBLIC OFFICIAL OF MONEY OR PROPERTY NOT DUE HIM OR HIS OFFICE WHETHER OR NOT THE TAKING WAS ACCOMPANIED BY FORCE, THREAT OR THE USE OF FEAR. IN OTHER WORDS, THE WRONGFUL USE OF OTHERWISE VALID OFFICIAL POWER MAY CONVERT DUTIFUL ACTIONS INTO EXTORTION.

SO, IF A PUBLIC OFFICIAL AGREES TO TAKE OR WITHHOLD OFFICIAL ACTION OR THE WRONGFUL PURPOSE OF INDUCING A VICTIM TO PART WITH PROPERTY, SUCH ACTION WOULD CONSTITUTE EXTORTION EVEN THOUGH THE OFFICIAL

WAS ALREADY DUTY-BOUND TO TAKE OR WITHHOLD THE ACTION IN QUESTION.

THE GOVERNMENT IS NOT REQUIRED TO PROVE THAT THE DEFENDANT DIRECTLY BENEFITED FROM ANY ACTS OF EXTORTION OR ATTEMPTED EXTORTION.

THE TERM "PUBLIC OFFICIAL" MEANS AN ELECTED OR APPOINTED OFFICIAL, INCLUDING A COUNTY COMMISSIONER.

THE TERM "PROPERTY" INCLUDES MONEY AND OTHER INTANGIBLE THINGS OF VALUE.

THE TERM "WRONGFUL" MEANS TO OBTAIN PROPERTY UNFAIRLY AND UNJUSTLY BY ONE HAVING NO LAWFUL CLAIM TO IT.

WHILE IT IS NOT NECESSARY TO PROVE THAT THE DEFENDANT SPECIFICALLY INTENDED TO INTERFERE WITH INTERSTATE COMMERCE, IT IS NECESSARY CONCERNING THIS ISSUE THAT THE GOVERNMENT PROVE THAT THE NATURAL CONSEQUENCES OF THE ACTS ALLEGED IN THE INDICTMENT WOULD BE TO AFFECT, DELAY OR OBSTRUCT INTERSTATE COMMERCE, WHICH MEANS THE FLOW OF COMMERCE OR BUSINESS ACTIVITY BETWEEN TWO OR MORE STATES.

NOW, LADIES AND GENTLEMEN OF THE JURY, I CHARGE YOU IT IS ALSO A CRIME TO ATTEMPT TO VIOLATE THE HOBBS ACT. THE ESSENTIAL ELEMENTS OF AN ATTEMPTED OFFENSE, EACH OF WHICH THE GOVERNMENT MUST PROVE

BEYOND A REASONABLE DOUBT, ARE, FIRST, THAT THE DEFENDANT ENGAGED IN CONDUCT WHICH CONSTITUTED A SUBSTANTIAL STEP TOWARD THE COMMISSION OF THE CRIME; AND SECOND, THAT THE DEFENDANT DID SO KNOWINGLY AND WILLFULLY.

TO ATTEMPT AN OFFENSE MEANS INTENTIONALLY TO DO SOME ACT IN AN EFFORT TO BRING ABOUT OR ACCOMPLISH SOMETHING THE LAW FORBIDS TO BE DONE.

ALL RIGHT, LADIES AND GENTLEMEN. AS REGARDS THE ELEMENTS OF INTERSTATE COMMERCE, A SUBSTANTIAL STEP WOULD BE THE EMBARKING ON A COURSE OF CONDUCT WHICH, IF COMPLETED, WOULD LIKELY AFFECT, DELAY OR OBSTRUCT INTERSTATE COMMERCE.

LADIES AND GENTLEMEN OF THE JURY, I CHARGE YOU THAT IT IS FOR THE -- IT IS FOR THE COURT AND NOT THE JURY TO DETERMINE WHETHER THE GOVERNMENT'S EVIDENCE, IF YOU BELIEVE IT BEYOND A REASONABLE DOUBT, IS SUFFICIENT TO ESTABLISH THE INTERSTATE COMMERCE REQUIREMENT OF THE ATTEMPTED EXTORTION CHARGE.

IN THIS CASE, THE GOVERNMENT CONTENDS THAT THE EVIDENCE SHOWS THAT IF THE REPRESENTATION MADE -- REPRESENTATIONS MADE BY AGENT CORMANY TO THE DEFENDANT HAD BEEN TRUE, THE DEVELOPMENT PROJECT HE PROPOSED COULD HAVE POTENTIALLY AFFECTED INTERSTATE COMMERCE.

IF CORMANY HAD BEEN A REAL DEVELOPER AND THE

REZONING PROPOSAL HAD BEEN A REAL PROJECT, THE GOVERNMENT CONTENDS THAT THERE WAS A POTENTIAL THAT THE ZONING WOULD HAVE BEEN APPROVED AND THAT THE PROJECT WOULD HAVE BEEN CONSTRUCTED AND THAT INTERSTATE COMMERCE WOULD HAVE BEEN AFFECTED BY THE CONSTRUCTION OF THE PROJECT.

MORE SPECIFICALLY, THE GOVERNMENT CONTENDS THE FOLLOWING: FIRST, THAT IN JULY OF 1986 AND FOR THE FOLLOWING -- AND THE FOLLOWING YEAR AND A HALF, THE DEVELOPMENT OF ANY APARTMENT PROJECT OR SINGLE FAMILY HOME, SUBDIVISION IN DEKALB COUNTY, GEORGIA, BY SUCH A REAL DEVELOPER WOULD HAVE REQUIRED THE INSTALLATION OF WATER PIPE, SEWAGE PIPE, WATER METERS AND COPPER TUBING CONNECTING THE WATER PIPES OF THE APARTMENT OR HOUSES TO THE MAIN DEKALB COUNTY WATER PIPE SYSTEM; SECOND, THAT THESE PIPES, METERS AND TUBING WOULD HAVE BEEN REQUIRED TO BE PURCHASED FROM THE DEKALB COUNTY DEPARTMENT OF PUBLIC WORKS, WHICH IN TURN PURCHASED SUCH PIPES, METERS AND TUBING IN COMMERCE FROM COMPANIES LOCATED IN STATES OUTSIDE OF THE STATE OF GEORGIA; THIRD, THAT THE DEVELOPMENT OF ANY APARTMENT PROJECT OR SINGLE FAMILY HOME SUBDIVISION WOULD HAVE REQUIRED THE USE OF HEAVY CONSTRUCTION EQUIPMENT, SUCH AS BULLDOZERS, BACKHOES, FRONT END LOADERS, DUMP TRUCKS AND TAMPING MACHINES;

AND FINALLY, THAT NONE OF THIS EQUIPMENT IS MANUFACTURED WITHIN THE STATE OF GEORGIA, AND THUS IT MUST BE INITIALLY MANUFACTURED IN AND OBTAINED FROM STATES OUTSIDE OF GEORGIA.

I CHARGE YOU THAT IF YOU BELIEVE THAT THE EVIDENCE -- LET'S TRY IT AGAIN.

I CHARGE YOU THAT IF YOU BELIEVE THAT THE EVIDENCE HAS ESTABLISHED BEYOND A REASONABLE DOUBT THE ABOVE SPECIFIC FACTUAL CONTENTIONS OF THE GOVERNMENT, THEN AS A MATTER OF LAW I HAVE DETERMINED THAT SUCH EVIDENCE WOULD SATISFY THE INTERSTATE COMMERCE REQUIREMENT FOR COUNT 1 IN THE INDICTMENT.

IF YOU DO NOT BELIEVE THAT THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THAT THE SPECIFIC FACTUAL CONTENTIONS OF THE GOVERNMENT RELATING TO THE INTERSTATE COMMERCE REQUIREMENT, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY.

THE QUESTION OF WHETHER THE GOVERNMENT'S FACTUAL CONTENTIONS RELATING TO INTERSTATE COMMERCE HAVE BEEN ESTABLISHED BEYOND A REASONABLE DOUBT IS A MATTER SOLELY WITHIN THE DISCRETION OF THE JURY TO DECIDE.

THE DEFENDANT CONTENDS THAT THE $8,000 HE RECEIVED FROM AGENT CORMANY WAS A CAMPAIGN CONTRIBUTION. THE SOLICITATION OF CAMPAIGN

CONTRIBUTIONS FROM ANY PERSON IS A NECESSARY AND PERMISSIBLE FORM OF POLITICAL ACTIVITY ON THE PART OF PERSONS WHO SEEK POLITICAL OFFICE AND PERSONS WHO HAVE BEEN ELECTED TO POLITICAL OFFICE. THUS, THE ACCEPTANCE BY AN ELECTED OFFICIAL OF A CAMPAIGN CONTRIBUTION DOES NOT, IN ITSELF, CONSTITUTE A VIOLATION OF THE HOBBS ACT EVEN THOUGH THE DONOR HAS BUSINESS PENDING BEFORE THE OFFICIAL.

HOWEVER, IF A PUBLIC OFFICIAL DEMANDS OR ACCEPTS MONEY IN EXCHANGE FOR SPECIFIC REQUESTED EXERCISE OF HIS OR HER OFFICIAL POWER, SUCH A DEMAND OR ACCEPTANCE DOES CONSTITUTE A VIOLATION OF THE HOBBS ACT REGARDLESS OF WHETHER THE PAYMENT IS MADE IN THE FORM OF A CAMPAIGN CONTRIBUTION.

A CAMPAIGN CONTRIBUTION CAN INVOLVE A GIFT, LOAN, FORGIVENESS OF DEBT, ADVANCE OR DEPOSIT OF MONEY OR THE CONVEYANCE OR TRANSFER OF ANYTHING OF VALUE FOR THE PURPOSE OF INFLUENCING THE NOMINATION OR THE ELECTION OF ANY PERSON FOR OFFICE.

TURNING TO THE SECOND COUNT. AS I HAVE ALREADY STATED, COUNT 2 OF THE INDICTMENT CHARGES THAT THE DEFENDANT WILLFULLY MADE A FALSE STATEMENT ON A TAX RETURN IN VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 72-06.

THIS SECTION MAKES IT A FEDERAL CRIME OR

OFFENSE TO WILLFULLY MAKE AND SIGN A TAX RETURN WHICH ONE DOES NOT BELIEVE TO BE TRUE AND CORRECT AS TO EVERY MATERIAL MATTER.

THE DEFENDANT CAN BE FOUND GUILTY OF THAT OFFENSE ONLY IF ALL OF THE FOLLOWING ELEMENTS ARE PROVED BEYOND A REASONABLE DOUBT: FIRST, THAT THE DEFENDANT MADE, SIGNED AND FILED THE TAX RETURN DESCRIBED IN THE INDICTMENT; SECOND, THAT THE TAX RETURN CONTAINED OR WAS VERIFIED BY A WRITTEN STATEMENT -- LET'S READ IT AGAIN: THAT THE TAX RETURN CONTAINED OR WAS VERIFIED BY A WRITTEN DECLARATION THAT IT WAS MADE UNDER THE PENALTIES OF PERJURY; THIRD, THAT THE TAX RETURN WAS FALSE AS TO A MATERIAL MATTER; FOURTH, THAT WHEN THE DEFENDANT MADE AND SIGNED THE TAX RETURN, HE DID SO WILLFULLY AND DID NOT BELIEVE THAT THE TAX RETURN WAS TRUE AND CORRECT AS TO EVERY MATERIAL MATTER.

IF YOU FIND FROM YOUR CONSIDERATION OF ALL THE EVIDENCE THAT EACH OF THESE ELEMENTS HAS BEEN PROVED BEYOND A REASONABLE DOUBT, THEN YOU SHOULD FIND THE DEFENDANT GUILTY OF THIS CHARGE.

IF, ON THE OTHER HAND, YOU FIND FROM YOUR CONSIDERATION OF ALL THE EVIDENCE THAT ANY OF THESE ELEMENTS HAS NOT BEEN PROVED BEYOND A REASONABLE DOUBT, THEN YOU SHOULD FIND THE DEFENDANT NOT GUILTY.

IT IS NOT NECESSARY THAT THE GOVERNMENT BE DEPRIVED OF ANY TAX BY REASON OF THE FILING OF THE RETURN, OR THAT IT EVEN BE SHOWN THAT ADDITIONAL TAX IS DUE TO THE GOVERNMENT.

A DECLARATION IS FALSE IF IT WAS UNTRUE WHEN MADE AND WAS THEN KNOWN TO BE UNTRUE BY THE PERSON MAKING IT. THE DECLARATION CONTAINED WITHIN A DOCUMENT IS FALSE IF IT WAS UNTRUE WHEN THE DOCUMENT WAS USED AND WAS THEN KNOWN TO BE UNTRUE BY THE PERSON USING IT.

THE MATERIALITY OF THE ALLEGED FALSE STATEMENT IS NOT A MATTER FOR YOU, THE JURY, TO DETERMINE, BUT IT IS A QUESTION FOR THE COURT TO DECIDE.

THE FALSE STATEMENT ALLEGED IN COUNT 2 OF THE INDICTMENT IS THAT THE TOTAL INCOME REPORTED ON THE RETURN DID NOT CONTAIN SUBSTANTIAL OTHER INCOME ALLEGEDLY RECEIVED BY THE DEFENDANT.

YOU ARE INSTRUCTED THAT THE FALSE STATEMENTS CHARGED IN THE INDICTMENT, IF THEY WERE MADE, WERE MATERIAL STATEMENTS. THE GOVERNMENT NEED NOT PROVE THE EXACT AMOUNT OF THE ADDITIONAL MONEY; IT IS SUFFICIENT IF IT PROVES BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAS HAD INCOME SUBSTANTIALLY IN EXCESS OF THE TOTAL INCOME HE REPORTED ON HIS RETURN.

I INSTRUCT YOU FURTHER THAT IF YOU FIND THAT THE MONEY THE DEFENDANT RECEIVED FROM CORMANY WAS A CAMPAIGN CONTRIBUTION AND THAT IT WAS USED TO PAY CAMPAIGN EXPENSES OR DEBTS, THE DEFENDANT WAS NOT REQUIRED TO REPORT IT AS INCOME ON HIS FEDERAL INCOME TAX RETURN.

I CHARGE YOU THAT THE WORD "WILLFULLY" AS THAT TERM HAS BEEN USED FROM TIME TO TIME IN THESE INSTRUCTIONS MEANS THAT THE ACT WAS COMMITTED VOLUNTARILY AND PURPOSELY WITH THE SPECIFIC INTENT TO DO SOMETHING THE LAW FORBIDS; THAT IS, WITH BAD PURPOSE EITHER TO DISOBEY OR DISREGARD THE LAW.

I CHARGE YOU THAT THE WORD "KNOWINGLY" AS THAT TERM HAS BEEN USED FROM TIME TO TIME IN THESE INSTRUCTIONS MEANS THAT THE ACT WAS VOLUNTARILY AND INTENTIONALLY -- WAS VOLUNTARILY AND INTENTIONALLY AND NOT BECAUSE OF MISTAKE OR ACCIDENT.

I CHARGE YOU FURTHER THAT INTENT ORDINARILY MAY NOT BE PROVED DIRECTLY, BECAUSE THERE IS NO WAY OF FATHOMING OR SCRUTINIZING THE OPERATIONS OF THE HUMAN MIND; BUT YOU MAY INFER THE DEFENDANT'S INTENT FROM THE SURROUNDING CIRCUMSTANCES.

YOU MAY CONSIDER ANY STATEMENT MADE AND DONE OR OMITTED BY THE DEFENDANT AND ALL OTHER FACTS AND CIRCUMSTANCES IN EVIDENCE WHICH INDICATE HIS STATE OF

MIND.

I CHARGE YOU FURTHER THAT THE DEFENDANT CONTENDS THAT HE WAS THE VICTIM OF ENTRAPMENT CONCERNING THE OFFENSE CHARGED IN COUNT 1 OF THE INDICTMENT.

I CHARGE YOU THAT THIS DEFENSE IS ONLY APPLICABLE TO THE EXTORTION CHARGE AS CONTAINED IN COUNT 1.

A PERSON IS ENTRAPPED WHEN HE IS INDUCED OR PERSUADED BY LAW ENFORCEMENT OFFICERS OR THEIR AGENTS TO COMMIT A CRIME THAT HE HAS NO PREVIOUS INTENT TO COMMIT. THE LAW, AS A MATTER OF POLICY, FORBIDS HIS CONVICTION IN SUCH A CASE.

HOWEVER, THERE IS NO ENTRAPMENT WHERE A DEFENDANT IS READY AND WILLING TO BREAK THE LAW AND THE GOVERNMENT AGENTS MERELY PROVIDE WHAT APPEARS TO BE A FAVORABLE OPPORTUNITY FOR THE DEFENDANT TO COMMIT THE CRIME.

FOR EXAMPLE, IT IS NOT ENTRAPMENT FOR A GOVERNMENT AGENT TO PRETEND TO BE SOMEONE ELSE AND TO OFFER EITHER DIRECTLY OR THROUGH AN INFORMER OR OTHER DECOY TO ENGAGE IN AN UNLAWFUL TRANSACTION WITH THE DEFENDANT.

SO, A DEFENDANT WOULD NOT BE THE VICTIM OF ENTRAPMENT IF YOU SHOULD FIND BEYOND A REASONABLE

DOUBT THE DEFENDANT WAS READY, WILLING AND ABLE TO COMMIT THE CRIME CHARGED IN THE INDICTMENT WHENEVER OPPORTUNITY WAS AFFORDED AND THAT THE GOVERNMENT OFFICER OR AGENT DID NO MORE THAN OFFER AN OPPORTUNITY.

ON THE OTHER HAND, IF THE EVIDENCE IN THE CASE LEAVES YOU WITH A REASONABLE DOUBT WHETHER THE DEFENDANT HAD ANY INTENT TO COMMIT THE OFFENSE EXCEPT FOR INDUCEMENT OR PERSUASION ON THE PART OF SOME GOVERNMENT OFFICER OR AGENT, THEN IT IS YOUR DUTY TO FIND THE DEFENDANT NOT GUILTY AS TO COUNT 1.

ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY, A SEPARATE OFFENSE OR CRIME IS CHARGED IN EACH COUNT OF THE INDICTMENT. EACH COUNT AND THE EVIDENCE WHICH PERTAINS TO IT SHOULD BE CONSIDERED SEPARATELY.

THE FACT THAT YOU MAY FIND THE DEFENDANT GUILTY OR NOT GUILTY AS TO ONE OF THE OFFENSES SHOULD NOT AFFECT YOUR VERDICT AS TO ANY OTHER OFFENSE CHARGED.

I CAUTION YOU, HOWEVER, AS MEMBERS OF THE JURY THAT YOU ARE HERE TO DETERMINE THE EVIDENCE IN THE CASE -- LET ME TRY IT ONE MORE TIME.

I CAUTION YOU, MEMBERS OF THE JURY, THAT YOU ARE HERE TO DETERMINE FROM THE EVIDENCE IN THE CASE WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY.

THE DEFENDANT IS NOT ON TRIAL FOR ANY OTHER SPECIFIC OFFENSE NOT CHARGED IN THE INDICTMENT.

ALSO, THE QUESTION OF PUNISHMENT SHOULD NEVER BE CONSIDERED BY THE JURY IN ANY WAY IN DECIDING THE CASE.

IF THE DEFENDANT IS CONVICTED, THE MATTER OF PUNISHMENT IS FOR THE JUDGE TO DETERMINE.

ANY VERDICT THAT YOU REACH IN THE JURY ROOM, WHETHER GUILTY OR NOT GUILTY, MUST BE UNANIMOUS. IN OTHER WORDS, TO RETURN A VERDICT, YOU MUST ALL AGREE; YOUR DELIBERATIONS WILL BE SECRET AND YOU WILL NEVER HAVE TO EXPLAIN YOUR VERDICT TO ANYONE.

IT IS YOUR DUTY AS JURORS TO DISCUSS THIS CASE WITH ONE ANOTHER IN AN EFFORT TO REACH AGREEMENT, IF YOU CAN DO SO. EACH OF YOU MUST DECIDE THIS CASE FOR YOURSELF, BUT ONLY AFTER FULL CONSIDERATION OF THE EVIDENCE WITH THE OTHER MEMBERS OF THE JURY.

WHILE YOU ARE DISCUSSING THE CASE, DO NOT HESITATE TO REEXAMINE YOUR OWN OPINIONS AND CHANGE YOUR MIND IF YOU BECOME CONVINCED THAT YOU WERE WRONG, BUT DO NOT GIVE UP YOUR HONEST BELIEFS SOLELY BECAUSE THE OTHERS THINK DIFFERENTLY OR MERELY TO GET THE CASE OVER WITH.

REMEMBER, IN A REAL SENSE, YOU ARE JUDGES, JUDGES OF THE FACTS. YOUR ONLY INTEREST IS TO SEEK

THE TRUTH FROM THE EVIDENCE IN THE CASE.

WHEN YOU GO TO THE JURY ROOM, YOU SHOULD FIRST SELECT ONE OF YOUR NUMBER OR ONE OF YOUR MEMBERS TO ACT AS YOUR FOREPERSON. THE FOREPERSON WILL PRESIDE OVER YOUR DELIBERATIONS AND WILL SPEAK FOR YOU IN COURT.

WE HAVE PREPARED A FORM OF THE VERDICT TO BE USED AS CONTAINED ON THIS WHITE SHEET, AND IT HAS THE CAPTION OF THE CASE AND IT'S ENTITLED "VERDICT." I WILL EXPLAIN IT TO YOU.

ALL RIGHT. IT HAS TWO ENTRIES; EACH COUNT MUST BE DECIDED, AND THAT'S LISTED SEPARATELY ON THE FORM. IT READS THIS WAY: WE, THE JURY, FIND THE DEFENDANT, AND IT SAYS "BLANK" AS TO COUNT 1. THE NEXT IS, WE, THE JURY, FIND THE DEFENDANT -- AND THERE'S A BLANK -- AS TO COUNT 2.

ALL RIGHT. YOU WILL TAKE THIS FORM TO THE JURY ROOM: AND IF YOUR DECISION IS THAT THE DEFENDANT IS GUILTY AS TO COUNT 1, THEN THE FORM OF YOUR VERDICT WILL BE: WE, THE JURY, FIND THE DEFENDANT GUILTY AS TO COUNT 1. IF, ON THE OTHER HAND, AS TO COUNT 1, YOUR VERDICT IS NOT GUILTY, THEN THE FORM OF YOUR VERDICT WILL BE: WE, THE JURY, FIND THE DEFENDANT NOT GUILTY AS TO COUNT 1.

MOVING TO COUNT 2. IF YOUR DECISION IS THAT

THE DEFENDANT IS GUILTY AS TO COUNT 2, THEN THE FORM OF YOUR VERDICT WILL BE: WE, THE JURY, FIND THE DEFENDANT GUILTY AS TO COUNT 2. IF, ON THE OTHER HAND, AS TO COUNT 2 YOUR VERDICT IS -- IF YOU FIND THE DEFENDANT NOT GUILTY, THEN THE FORM OF YOUR VERDICT WILL BE: WE, THE JURY, FIND THE DEFENDANT NOT GUILTY AS TO COUNT 2.

ALL RIGHT. YOU WILL TAKE THIS VERDICT FORM TO THE JURY ROOM; AND WHEN YOU HAVE REACHED A UNANIMOUS DECISION, YOU WILL HAVE YOUR FOREPERSON FILL IN THE VERDICT, DATE IT AND SIGN IT AND THEN RETURN IT TO THE COURTROOM.

IF YOU SHOULD DESIRE TO COMMUNICATE WITH THE JUDGE AT ANY TIME, PLEASE WRITE DOWN YOUR MESSAGE OR QUESTION AND PASS THE NOTE TO THE UNITED STATES MARSHAL, OR THE COURT SECURITY OFFICER, WHO WILL PROMPTLY RETURN IT TO THE JUDGE FOR THE JUDGE'S ATTENTION. I WILL THEN RESPOND AS PROMPTLY AS POSSIBLE EITHER BY BRINGING YOU BACK IN THE COURTROOM OR GIVING YOU A WRITTEN ANSWER, AS THE CASE MIGHT BE.

I CAUTION YOU, HOWEVER, WITH REGARD TO ANY QUESTION YOU MIGHT SEND OUT THAT YOU SHOULD NEVER STATE AS TO HOW YOU ARE DIVIDED NUMERICALLY, IF YOU ARE IN FACT DIVIDED, BECAUSE THAT IS NOT THE BUSINESS OF THE JUDGE OR THE REST OF THE PARTIES.

ALL RIGHT. NOW, YOU MAY RETIRE TO THE JURY ROOM. RIGHT NOW, DON'T DO ANYTHING UNTIL YOU HAVE HEARD FROM THE JUDGE. JUST SIT AT EASE BACK THERE.

YOU MAY RETIRE.

(THE JURY EXITED THE COURTROOM.)

THE COURT: ALL RIGHT. I WILL HEAR YOUR EXCEPTIONS TO THE CHARGES.

MR. BEVER: YES, THERE ARE, YOUR HONOR.

THE EXCEPTIONS SPECIFICALLY WILL BE WITH RESPECT TO GOVERNMENT'S SUBMITTED CHARGES WHICH WERE NOT GIVEN --

THE COURT: ALL RIGHT, SIR.

MR. BEVER: -- THOSE BEING THE FOLLOWING CHARGES: GOVERNMENT'S REQUEST TO CHARGE NUMBER 7 --

THE COURT: YES, SIR.

MR. BEVER: -- WHICH WAS NOT GIVEN; REQUEST TO CHARGE NUMBER 10, PARAGRAPHS SIX AND SEVEN, WHICH WAS NOT GIVEN --

THE COURT: ALL RIGHT, SIR.

MR. BEVER: -- GOVERNMENT'S REQUEST TO CHARGE NUMBER 11, WHICH WAS NOT GIVEN; THE REQUEST TO CHARGE NUMBER 15, 16, 17 AND 18, WHICH WERE NOT GIVEN; GOVERNMENT'S REQUEST TO CHARGE NUMBER 21, WHICH WAS NOT GIVEN; 23, WHICH WAS NOT GIVEN; 24, WHICH WAS NOT GIVEN.

ORIGINAL

No. 90-6105

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN H. EVANS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
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QUESTION PRESENTED

Whether a public official may be convicted of extortion under color of official right in violation of the Hobbs Act only if the jury is instructed that it must find that the public official initiated the transaction that resulted in his receipt of an unlawful payoff.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 910 F.2d 790.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1990. The petition for a writ of certiorari was filed on October 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner, an elected County

Commissioner, was convicted of attempted extortion "under color of official right," in violation of the Hobbs Act, 18 U.S.C. 1951; and of filing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to 18 months' imprisonment for the Hobbs Act violation and to four years' probation on the tax fraud count. The court of appeals affirmed.

1. In 1985, Clifford Cormany, Jr., an FBI agent, was working undercover in the Atlanta area investigating allegations of public corruption. He posed as a representative of a group of real estate investors interested in developing land in DeKalb County. In March 1985, Agent Cormany was introduced to petitioner, an elected member of the DeKalb County Board of Commissioners, by Albert Johnson, an individual also under investigation. Petitioner was told that Cormany's investment group was looking for assistance with matters relating to rezoning and variances. Pet. App. 3.

Between August 1985 and October 1986 petitioner and Agent Cormany had a series of meetings and telephone conversations, most of which were video-taped or audio-taped. At the first of these meetings, in August 1985, Cormany told petitioner that he wanted to give his investment group a "leg up" on other developers in DeKalb County by cultivating a close association with the public bodies that dealt with zoning and related matters. Petitioner agreed to arrange for Cormany and Johnson to meet with other County Commissioners. Pet. App. 3.

In May 1986, Cormany and Johnson contacted petitioner and told him that they wanted to have a plot zoned for the highest density

possible and were willing to do whatever was needed to achieve that result. During the course of that conversation, there was a discussion of petitioner's reelection campaign. In response to a query from Johnson about what size contribution would be considered "meaningful," petitioner replied that at a recent fundraising event contributors were encouraged to give $1,000 apiece. Johnson also asked whether petitioner needed any "expense money." Petitioner stated that he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that the registration list would cost him about $260. Cormany then wrote out a check to petitioner for $300. Petitioner used that money to buy the list and sent a thank you note to Cormany. Pet. App. 3-4.

In July 1986, Cormany and Johnson met petitioner again and informed him that they had a particular tract of land in mind for rezoning to a higher density. They told petitioner that expense monies would be available for him if needed. Petitioner recommended that Cormany and Johnson meet with members of the County Planning Department so they could get their rezoning application filed as soon as possible. On the morning of July 23, 1986, petitioner called Cormany. The two men discussed the rezoning application and petitioner's campaign, and they arranged to meet the next day. Pet. App. 4.

Petitioner and Cormany met as scheduled on July 24. Petitioner showed Cormany a document containing his campaign budget from June 29 through the primary election on August 12. The document showed a budget of $14,180 and campaign contributions of

$6,295, resulting in a shortfall of $7,885. After Cormany said, "I desperately need[] your help and support on this project," petitioner said: "Well, let me tell you. I, it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that." Pet. App. 4. When Cormany responded, "You're talking about seven eight eighty-five," petitioner responded affirmatively, and stated, "I understand both of us are groping * * * for what we want to say to each other." Ibid. Petitioner added: "If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do." Id. at 5.

Cormany then asked whether his contribution should be in cash or by check. Petitioner first responded that the payment should be in cash, "so there won't be any, any, tinges, or anything." Pet. App. 4. He then modified that by asking for a check for $1,000, adding "that means we gonna record it and report it and then the rest would be in cash." Ibid. Cormany then said, "I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way," and petitioner responded, "I understand that." Ibid.

Later that day, but before Cormany had paid petitioner, Cormany tried to file the application for rezoning the property, but the application was rejected because the property had been

rezoned less than two years earlier. Petitioner and Cormany met again on July 25 and discussed whether the two-year limitation could be waived. At that meeting, Cormany gave petitioner $7,000 in cash, which petitioner placed in an envelope, and a check for $1,000 payable to "John Evans Campaign." Petitioner locked the cash in a file cabinet in his campaign office. Petitioner did not at that time record the $7,000 in cash on his books or on the required state campaign financing disclosure form. At the August 12 DeKalb County Commission meeting, the waiver was granted by a 4-0 vote. Pet. App. 5.

Cormany subsequently informed petitioner that approval of the zoning application would require an amendment to the comprehensive land use plan. After the Planning Department recommended denial of the application to make such an amendment to the comprehensive plan, Cormany withdrew the zoning application. Pet. App. 5.

About 14 months after Cormany had given petitioner the $8,000, two FBI agents interviewed petitioner at his office. Petitioner was informed that the agents wished to ask him about campaign contributions he had received from developers. Petitioner told the agents that Cormany had given him $1,000 and that all of the contributions he received from individuals were reflected in his campaign disclosure reports. Petitioner did not mention the $7,000 cash payment he received from Cormany. Pet. App. 5-6.

At the end of petitioner's campaign, he had a surplus of more than $7,000, counting the $7,000 he received in cash from Cormany. Petitioner argued that he used $4,100 of the $7,000 to repay in

cash a portion of an old campaign debt to his mother, and used the remaining $2,900 to repay himself for loans he made to his campaigns from 1982 through 1986. He did not record these payments in his books or amend his state disclosure forms, however, until after he knew he was under investigation. He did not report the $7,000 payment as personal income on his 1986 income tax return. Pet. App. 5-6.

2. On June 16, 1988, petitioner was indicted on one count of violating the Hobbs Act by wrongfully obtaining under color of official right both the $1,000 campaign contribution check and the $7,000 cash payment. He also was indicted on one count of filing a false 1986 income tax return by not reporting the $7,000 cash payment as personal income.

With respect to the tax fraud count, the district court instructed the jury: "[I]f you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return." Pet. App. 36. With respect to the Hobbs Act count, the district court instructed the jury that it was not a violation of the Hobbs Act to take a campaign contribution unless the contribution was induced as a quid pro quo for an official act:

> The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Pet. App. 7, 32-33. The district court further instructed the jury that to convict petitioner on either the Hobbs Act count or the tax fraud count it must find that petitioner acted "voluntarily and purposely with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law." Pet. App. 36.

The jury convicted petitioner on both the tax fraud count and the Hobbs Act count.

3. The court of appeals affirmed. Pet. App. 1-15. With respect to the Hobbs Act conviction, the court rejected petitioner's argument that the jury should have been instructed that it had to find that petitioner initiated the transaction that induced Cormany to part with the money. The court instead held that for the offense of extortion under color of official right, the "inducement" requirement of the Hobbs Act is satisfied if "the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power." Pet. App. 7.

ARGUMENT

1. Petitioner asserts (Pet. 16-23) that there is a conflict among the circuits respecting whether a public official must initiate a corrupt payoff to satisfy the "inducement" element of a Hobbs Act violation. While a theoretical conflict does exist

among the circuits on the meaning of inducement under the Hobbs Act, in this case and in virtually all other cases the outcome would be the same under any of the differing formulations of inducement. Accordingly, review by this Court is not warranted. Petitioner also suggests that this case should be held for the decision in United States v. McCormick, No. 89-1918. However, that is not appropriate because McCormick does not present the issue raised in this case.

a. The Hobbs Act defines "extortion" to include "the obtaining of property from another, with his consent, induced * * * under color of official right." 18 U.S.C. 1951(b)(2). A number of courts of appeals have stated that a public official who received a payoff may be found guilty under the Act as long as the official knew that the wrongful payment he received was motivated by a desire for a specific exercise of his official power. See, e.g., United States v. Garner, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); United States v. Spitler, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); United States v. McClelland, 731 F.2d 1438, 1439-1440 (9th Cir. 1984), cert. denied, 472 U.S. 1010 (1985); United States v. Jannotti, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); United States v. French, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Williams, 621 F.2d 123, 123-124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); United States v. Butler, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980); United States v. Hall, 536 F.2d 313, 320-321 (10th

Cir.), cert. denied, 429 U.S. 919 (1976); United States v. Hathaway, 534 F.2d 386, 393-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976); United States v. Trotta, 525 F.2d 1096, 1100 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976).

Recently, the Ninth and Second Circuits have held that evidence of the mere passive receipt of an unlawful payoff by a public official is not sufficient to support a Hobbs Act conviction. United States v. Aguon, 851 F.2d 1158, 1166-1167 (9th Cir. 1988) (en banc); United States v. O'Grady, 742 F.2d 682, 687-689 (2d Cir. 1984) (en banc). Those two cases create a theoretical conflict with the other circuits, but the conflict has little practical significance. As the Seventh Circuit recognized, "[t]here is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been presented was the official passive." United States v. Holzer, 816 F.2d 304, 311 (7th Cir.), vacated, 488 U.S. 928 (1987), aff'd in part on remand, 840 F.2d 1343 (1988). Indeed, the Second Circuit reviewed each of the appellate decisions suggesting that passive acceptance of a gratuity violates the Hobbs Act, and concluded that "the facts of those cases * * * establish conduct from which inducement can readily be inferred." 742 F.2d at 689.

Moreover, the Second Circuit and the Ninth Circuit both recognized that a public official may induce a payoff in a variety of ways. The Second Circuit stated that "[p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a quid pro quo would

suffice as would other circumstantial evidence tending to show that the public official induced the benefits." 742 F.2d at 691-692. In the case before it, the court added, if the defendant "created the impression, not by words but by deeds, that vendors whose business fortunes with the [New York City Transit Authority] depended on him were expected to make generous 'gifts' to him, then [the defendant] could not escape conviction." Id. at 692. The Ninth Circuit similarly held that "'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation' such as might have been communicated by the nature of defendant's prior conduct in office." 851 F.2d at 1166.

Subsequent decisions of the Second and Ninth Circuits make clear that Aguon and O'Grady provide only that a Hobbs Act conviction may not be "based on mere acceptance of a contribution." United States v. Egan, 860 F.2d 904, 907 (9th Cir. 1988). In Egan, the "district court did not use the word 'inducement' in its jury instructions," ibid., but the Ninth Circuit affirmed a Hobbs Act conviction because the instructions provided that the defendant could be convicted only if the jury found that he had communicated that favors were for sale. In United States v. Campo, 774 F.2d 566, 569 (1985), quoting 742 F.2d at 694 (Pierce, J., concurring), the Second Circuit noted that a majority of the court had concluded in O'Grady "that 'the jury should be permitted to infer inducement by the defendant based upon a finding of repeated acceptances over a period of time of substantial benefits.'" The court in Campo affirmed the Hobbs Act conviction of a police officer who

repeatedly accepted $50 from the operator of a disco for patrolling the area around the disco, although the police officer had not initiated the payoffs. 774 F.2d at 568.

The first question presented in the petition states that the issue is whether a Hobbs Act conviction may be based "upon mere passive acceptance" of a payoff. Pet. i. But the facts did not show mere passive acceptance. To the contrary, the give and take between petitioner and Cormany evident during their recorded conversation on July 24, 1986, would constitute "inducement" of a payoff by petitioner in any court of appeals, including the Second and Ninth Circuits. It was petitioner who said, "you don't know how I operate" and proceeded to suggest the proper amount of the payoff by referring to his campaign budget. Pet. App. 4. It was also petitioner who reassured Cormany that "I understand both of us are groping * * * for what we need to say to each other." Ibid. And petitioner took the initiative in directing that the $8,000 payment should be divided between a $1,000 campaign contribution that would be reported as such and a $7,000 cash payment that would not be reported "so there won't be any, any, tinges, or anything." Id. at 5.

The jury instructions also required the jury to find inducement on petitioner's part. The jury was instructed that it had to find that the payments were made as part of a quid pro quo arrangement, Pet. App. 33, and that is sufficient to constitute proof of inducement in the Second and the Ninth Circuits. Aguon, 742 F.2d at 691-692; Campo, 774 F.2d at 569; Egan, 860 U.S. at 907.

Since the jury found that petitioner offered his services for sale and entered into an arrangement in which he effectively sold those services for money, his conviction would be affirmed by any court of appeals. This case therefore does not warrant further review by this Court.

b. There is no need to hold this case for McCormick v. United States, because the petitioner in McCormick has not raised the question presented here. The focus of the petitioner's argument in McCormick is that the jury was instructed that it need not find that "the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of money not lawfully owed." 89-1918 J.A. 22, 32-33. No such issue is presented in this case, where the jury was told that a public official violates the Hobbs Act if he "demands or accepts money in exchange for [a] specific requested exercise of his or her official power." Pet. App. 33. The petitioner in McCormick also broadly argues that extortion "under color of official right" merely prohibits public officials from pretending that a fee is due or that a fee in excess of the lawful fee is due. If the Court were to agree with that argument that the Hobbs Act proscribes fraud rather than extortion, prosecutions such as this would not be permissible. However, petitioner has not advanced the argument that extortion under color of official right is committed only where a public official pretends that a fee is due, so there is no reason to hold this case for McCormick.

2. The second question presented is whether an elected public official may be convicted of filing a false tax return for not reporting money that was used to pay old campaign debts. As petitioner concedes, Pet. i n.1, that issue was not raised before the Eleventh Circuit and was not addressed in the court of appeals' opinion. The petition does not include any argument on this second question, but footnote 1 in the petition suggests that the question is fairly subsumed by the primary question presented concerning the nature of the proof of inducement required under the Hobbs Act.

Contrary to petitioner's suggestion, the tax fraud question he seeks to raise is entirely separate and distinct from the Hobbs Act question presented in this case. The jury was instructed that it could not convict petitioner of tax fraud if it found "that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts." Pet. App. 36. It is apparent that the jury disbelieved petitioner's claim that his payments to his mother and to himself were reimbursements of expenses or debts out of campaign funds, but instead found that petitioner held the $7,000 in cash as personal income. Petitioner's failure to record those asserted "repayments" until after he discovered he was under investigation may well have influenced the jury in its assessment of the credibility of this defense. In light of the finding by the jury that petitioner accepted a cash payoff rather than a campaign contribution and failed to report it on his tax return, his tax fraud conviction should stand. That is so even if his Hobbs Act conviction were

reversed on account of defective jury instructions with respect to inducement, since the tax fraud offense does not require proof that petitioner induced the payment he failed to report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

ORIGINAL

NO. 90-6105

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. The United States concedes there is a conflict between the circuits with respect to the requirement of "inducement" under the Hobbs Act with the Second and Ninth Circuits holding, en banc, that inducement is required. United States v. Aguon, 851 F.2d 1158, 1167 (9th Cir. 1988) (en banc); United States v. O'Grady, 742 F.2d 682, 684 (2d Cir. 1984) (en banc). The government concludes, however, that this conflict "has little practical significance" since in the instant case the petitioner was not "passive." (Resp. 9-11)

Whether or not the petitioner was "passive" mischaracterizes the issue. The statute defines "extortion" as the obtaining of property from another, with his consent, induced * * * under color of official right." 18 U.S.C. § 1951(b)(2). The issue is whether the defendant "induced" a campaign contribution under color of office, not whether Evans was passive or not passive (Resp. 11) in his conversation with the undercover agent.[1] If Evans "induced" or required such a payment he runs afoul of the Hobbs Act. The

[1] Both in its Statement of Facts and in Argument, the government intimates that Evans was requesting a campaign contribution when he said, "Well, let me tell you. I, it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that." (Resp. 4, 11). Taken in context the conversation reveals just the opposite is true. Evans was responding to the agent's statement that he needed Evans' help and influence. Evans' statement beginning with, "it's cause, see you don't know how I operate" was Evans' way of telling the agent that he was not pressuring him for a contribution and that Evans' help would be no different regardless of any amount Cormany chose to give. See generally, defendant's Petition, 9-12.

evidence showed that Evans did not induce the payment nor ever indicate that payment was necessary for any service that he would provide under color of office.

The Eleventh Circuit adds its own gloss to the statute by eliminating "inducement" from the Hobbs Act altogether with its legislative-like pronouncement that "the requirement of inducement is automatically satisfied by the power connected with the public office." United States v. Evans, 910 F.2d 790, 796-797 (11th Cir. 1990).

2. The government argues further that "[t]he jury instructions also required the jury to find inducement on petitioner's part." (Resp. 11) The jury instruction did not require inducement. The government goes on to explain that a "quid pro quo arrangement" is a substitute for inducement. (Resp. 11) However, the statute does not speak of a quid pro quo. On the contrary, as the Fifth Circuit teaches, "[s]uch a quid pro quo may, of course, be forthcoming in an extortion case, or it may not. In either event, it is not an essential element of the crime." United States v. Dozier, 672 F.2d 531, 540 (5th Cir. 1982), citing United States v. Trotta, 525 F.2d 1096, 1100 (2nd Cir. 1975), cert. den. 425 U.S. 971, 96 S. Ct. 2167 (1976). The issue is not whether Evans agreed to a campaign contribution in exchange for a service of his office; it is whether Evans "induced" the campaign contribution. The instruction to the jury must so indicate. Here, it did not.

The jury instruction stated in no uncertain terms that the defendant was guilty of a Hobbs Act violation if he "accepts money

in exchange for [a] specific requested exercise of his * * * official power." (Petition, 20-21) This instruction authorized the jury to convict of a Hobbs Act violation if the jury believed money was exchanged for a requested service. Thus, the undercover agent offered Evans money for his campaign and simultaneously made a request of Evans for an exercise of official power to make it appear that the two were linked. Not only did this instruction ignore any requirement of inducement on Evans' part, it effectively required Evans to affirmatively disassociate himself from the agent's request at the time he accepted the campaign contribution or risk conviction. Cormany well knew Evans was willing to assist him when he asked for Evans' help as Evans had already been assisting Cormany for over a year and had never initiated a request for a contribution. See Petitioner's Statement of Facts, pp. 5-12. Evans was guilty of poor judgment, but not of inducing the contribution.[2]

3. Petitioner does not wish the Court to "hold this case for McCormick v. United States" (Resp. 12) but rather to set this case down for argument as it presents issues in addition to those presented in McCormick.

Respectfully submitted,

C. MICHAEL ABBOTT
Attorney for Petitioner

[2] The district court instruction also focused the jury's attention on the "request" of the undercover agent, not the intent of Evans. The Eleventh Circuit affirmed that view. See defendant's Petition, 21-23.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Reply to Brief in Opposition by depositing the document in the United States Postal Service with first-class postage prepaid, addressed to counsel of record at the following address:

Hon. Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Dated this 4 day of January, 1991.

C. Michael Abbott
Counsel of Record

(5)

No. 90-6105

In The

Supreme Court of the United States

October Term, 1991

JOHN H. EVANS, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed October 29, 1990
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL
	:	INDICTMENT
v.	:	
JOHN H. EVANS, JR.	:	NO. 88-269-A

THE GRAND JURY CHARGES:

COUNT ONE

That on or about July 25, 1986, in the Northern District of Georgia, the defendant, JOHN H. EVANS, JR., did attempt to affect interstate commerce, as defined in Title 18, United States Code, Section 1951(b)(3), by means of extortion and attempted extortion, as defined in Title 18, United States Code, Section 1951(b)(2), that is, the defendant did unlawfully obtain property, that being $8,000.00, from Clifford Cormany, a/k/a Steve Hawkins, with his consent, for the purpose of influencing the defendant's conduct in relation to his position as a public official, which sum of money was not due either the defendant or his office and position, said consent being wrongfully obtained from Clifford Cormany, a/k/a Steve Hawkins, under color of official right, in violation of Title 18, United States Code, Section 1951.

COUNT TWO

That on or about April 15, 1987, in the Northern District of Georgia, JOHN H. EVANS, JR., a resident of Atlanta, Georgia, did willfully make and subscribe, and cause to be made and subscribed, a Form 1040 U.S. Individual Income Tax Return for 1986, in the joint name of John H. & Ina C. Evans which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said 1986 income tax return he did not believe to be true and correct as to every material matter in that the said return stated John H. & Ina C. Evans' adjusted gross income in 1986 was $28,739.67, whereas, as he then and there well knew and believed, the Evans' adjusted gross income in 1986 was at least $35,739.67 as a result of a $7,000 cash payment he received from Clifford Cormany, a/k/a Steve Hawkins.

In violation of Title 26, United States Code Section 7206(1).

A _____ BILL

_____
FOREPERSON

/s/ Robert L. Barr, Jr.
ROBERT L. BARR, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

/s/ Wm. L. McKinnon, Jr.
WILLIAM L. McKINNON, JR.
ASSISTANT UNITED STATES ATTORNEY

_____

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

(Caption Omitted In Printing)

* * *

Jury Instructions

[125] (Jury Absent.)

THE COURT: All right. Let everyone come in who's coming in. If you're going out, you have to go out before I start.

MR. ABBOTT: Judge, may I get Mr. Lotito?

THE COURT: We are going to have to tie you all down to your seats.

(Laughter.)

THE COURT: All right. I'm going to charge the jury. The likelihood is good I will send the written charge out with the jury.

Okay. Bring the jury in, Mr. Jones.

(The jury entered the courtroom.)

THE COURT: All right, members of the jury, if you would kindly give me your attention. It now becomes the duty of the judge to instruct you on the rules of law that you must follow and apply in deciding this case.

When I have finished, you will go to the jury room and begin your discussions, what we sometimes call deliberations. It will be your duty to decide whether the government has proved beyond a reasonable doubt the

specific facts necessary to find the defendant guilty of the crimes charged in the indictment.

[126] Now that you have heard all of the evidence and the argument of counsel, it becomes the duty of the judge to give you the instructions of the court concerning the law applicable to the case.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial. You must not be influenced in any way by either sympathy or prejudice for or against the defendant or the government.

You must also follow the law as I explain it to you, whether you agree with the law or not, and you must follow all of my instructions as a whole. You may not single out one or disregard any of the court's instructions on the law.

As stated to you earlier, the indictment or formal charge by which this case came to this court against the defendant is not evidence of guilt and may not be considered as evidence of guilt.

I charge you that the defendant has come into court and pled not guilty to each of the charges. The effect of his pleading not guilty has placed the burden on the government of proving each element and each offense charged beyond a reasonable doubt.

The defendant is presumed by the law to be innocent. The law does not require a defendant to [127] prove his innocence or produce any evidence at all.

The government has the burden of proving a defendant guilty beyond a reasonable doubt; and if it fails to do so, you must find the defendant not guilty.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt.

A reasonable doubt is a real doubt, based upon reason and common sense, after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

If you are convinced that the defendant has been proven guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As stated earlier, you must consider only the evidence I have admitted in the case. The term evidence includes the testimony of the witnesses and [128] the exhibits admitted into the record.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in the case. Except for my instructions to you on

the law, you should disregard anything I have said during the trial in arriving at your own decision concerning the facts.

Concerning the evidence, you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial.

Direct evidence is the evidence – direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness.

Circumstantial evidence is the proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty.

The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

[129] Now, in saying that you must consider all the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness has had to say and how important that testimony was.

In making that decision, you may believe or disbelieve any witness in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: did the person impress you as one who was telling the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things about which he or she testified? Did he or she appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from the testimony of other witnesses?

You may also ask yourself whether there was [130] evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony which he or she gave before you during the trial.

You should keep in mind, or course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembered it, because people naturally tend to forget some things or remember other things inaccurately.

So, if a witness had made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood. That may depend upon whether it has to do with an important fact or with some – or only with an unimportant detail.

As stated before, a defendant has a right not to testify. If a defendant does testify, however, you should

decide in the same way as that of any other witness whether you believe his testimony.

Now, ladies and gentlemen, during the course of the trial, certain transcripts were admitted into evidence. I charge you that these transcripts have [131] been admitted for the limited and secondary purpose of assisting the jury in following the content of conversations as you listened to the tape recordings and also to help you in identifying speakers.

However, you are specifically instructed that whether the transcript correctly reflects – reflect the content of the conversation or the identity of the speakers is entirely for you to determine.

If the jury should determine that any transcript is in any respect incorrect, you should disregard it to that extent.

When knowledge of a technical subject matter might be helpful to a jury, a person having special training or experience in a technical field, one who is called an expert witness, is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as any other witness, it is up to you to decide whether to rely upon it.

In this case, as you know, the indictment charges two separate offenses, also called counts. Now, I will not read the indictment to you at this [132] time because you will be given a copy of the indictment, which will be with you

in the jury room for you to consider and study during your deliberations.

In summary, Count 1 charges that the defendant willfully attempted to extort money under color of official right and in so doing to affect commerce in violation of Title 18, United States Code 19-51.

Count 2 charges that the defendant willfully made and signed a tax return which the defendant did not believe to be true and correct as to every material matter in violation of Title 26, United States Code, 72-06.

In a few minutes, I will explain in more detail the elements of those charges.

You will note that the indictment charges that the offense was committed on or about a certain date. The government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the government proved beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

I will now read to you the defendant's theory of the case. Now, as I read to you the [133] defendant's theory of the case, I will be stating to you the contentions of the defendant as provided to the judge, and not statements of the court or findings of the court as to any fact in this case.

Count 1. In Count 1, John Evans has been charged with accepting money under color of official right. John Evans contends that he accepted the money as a campaign contribution. He further contends that he agreed to assist Steve Hawkins in August 1985 prior to discussions

about the possibility of a campaign contribution being made.

He contends that he agreed to support Hawkins' project because Hawkins and Al Johnson asked him to help and represented to Evans that their project would be a quality project, was legitimate, and would comply with all regulations.

Mr. Evans contends that the assistance he provided was limited to, one, introducing Hawkins to other commissioners; two, checking to see whether other commissioners would support Hawkins' request that the Board of Commissioners waive a two year waiting requirement, or allowing Hawkins to withdraw his zoning request without prejudice; and three, agreeing to support Hawkins' project himself based on Hawkins' representation to Evans that the project [134] would comply with zoning regulations and is a good project.

Evans contends that his activities were all legitimate activities for a commissioner. Evans also contends that he placed limits on all support noting that he would – that he would in the final analysis do what was prudent under the circumstances.

Evans contends he did not attempt to influence the vote of other commissioners nor anyone on the Planning Commission, Planning Department or Community Council.

Evans further contends that he repeatedly told Hawkins that Hawkins needed to meet other commissioners as well as Charlie Coleman of the Planning

Department so Hawkins would explain – so Hawkins would explain the project himself.

Evans says that he did not seek to hide his assistance and told Hawkins to use his name with Coleman.

Evans contends that he never threatened to withhold his support if he did not receive a campaign contribution; that he would have rendered the same assistance to Hawkins regardless of the size of any campaign contribution or whether he received any campaign contribution at all.

[135] Count 2. In Count 2, John Evans has been charged with making a false statement on his income tax return in 1986 by not reporting $7,000 in income – this is continuing the defendant's contentions – John Evans contends that the $7,000 was accepted by him as a campaign contribution, and that he was not required to report it on his income tax return.

He contends further that the entire amount was used to repay a campaign debt to his mother and to partially repay his own loans to his campaign and district office.

Now returning to the charges, the elements of the charges set forth in the indictment. Count 1 of the indictment is brought under a federal statute which is commonly known as the Hobbs Act. This statute, 18 United States Code, Section 19-51(A) provides in pertinent part as follows: whosoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion, or attempts, or conspiracy to do so shall be guilty of an offense against the United States.

This statute makes it a federal crime or offense for anyone to extort something from anyone else and in so doing to interfere with interstate [136] commerce.

The defendant can only – the defendant can be found guilty of that offense only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; Second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; Third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.

Extortion under color or official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.

So, if a public official agrees to take or withhold official action or the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official [137] was already duty-bound to take or withhold the action in question.

The government is not required to prove that the defendant directly benefited from any acts of extortion or attempted extortion.

The term "public official" means an elected or appointed official, including a county commissioner.

The term "property" includes money and other intangible things of value.

The term "wrongful" means to obtain property unfairly and unjustly by one having no lawful claim to it.

While it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, it is necessary concerning this issue that the government prove that the natural consequences of the acts alleged in the indictment would be to affect, delay or obstruct interstate commerce, which means the flow of commerce or business activity between two or more states.

Now, ladies and gentlemen of the jury, I charge you it is also a crime to attempt to violate the Hobbs Act. The essential elements of an attempted offense, each of which the government must prove [138] beyond a reasonable doubt, are, first, that the defendant engaged in conduct which constituted a substantial step toward the commission of the crime; and second, that the defendant did so knowingly and willfully.

To attempt an offense means intentionally to do some act in an effort to bring about or accomplish something the law forbids to be done.

All right, ladies and gentlemen. As regards the elements of interstate commerce, a substantial step would be the embarking on a course of conduct which, if completed, would likely affect, delay or obstruct interstate commerce.

Ladies and gentlemen of the jury, I charge you that it is for the – it is for the court and not the jury to determine whether the government's evidence, if you believe it beyond a reasonable doubt, is sufficient to establish the interstate commerce requirement of the attempted extortion charge.

In this case, the government contends that the evidence shows that if the representation made – representations made by agent Cormany to the defendant had been true, the development project he proposed could have potentially affected interstate commerce.

If Cormany had been a real developer and the [139] rezoning proposal had been a real project, the government contends that there was a potential that the zoning would have been approved and that the project would have been constructed and that interstate commerce would have been affected by the construction of the project.

More specifically, the government contends the following: First, that in July of 1986 and for the following – and the following year and a half, the development of any apartment project or single family home, subdivision in Dekalb County, Georgia, by such a real developer would have required the installation of water pipe, sewage pipe, water meters and copper tubing connecting the water pipes of the apartment or houses to the main Dekalb County water pipe system; second, that these pipes, meters and tubing would have been required to be purchased from The Dekalb County Department of Public Works, which in turn purchased such pipes, meters and tubing in commerce from companies located in states

outside of the state of Georgia; third, that the development of any apartment project or single family home subdivision would have required the use of heavy construction equipment, such as bulldozers, backhoes, front end loaders, dump trucks and tamping machines; [140] and finally, that none of this equipment is manufactured within the state of Georgia, and thus it must be initially manufactured in and obtained from states outside of Georgia.

I charge you that if you believe that the evidence – let's try it again.

I charge you that if you believe that the evidence has established beyond a reasonable doubt the above specific factual contentions of the government. Then as a matter of law I have determined that such evidence would satisfy the interstate commerce requirement for count 1 in the indictment.

If you do not believe that the evidence established beyond a reasonable doubt that the specific factual contentions of the government relating to the interstate commerce requirement, then you must find the defendant not guilty.

The question of whether the Government's factual contentions relating to interstate commerce have been established beyond a reasonable doubt is a matter solely within the discretion of the jury to decide.

The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The

solicitation of campaign [141] contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or accepts money in exchange for specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

A campaign contribution can involve a gift, loan, forgiveness of debt, advance or deposit of money or the conveyance or transfer of anything of value for the purpose of influencing the nomination or the election of any person for office.

Turning to the second count. As I have already stated, count 2 of the indictment charges that the defendant willfully made a false statement on a tax return in violation of Title 26, United States Code, Section 72-06.

This section makes it a federal crime or [142] offense to willfully make and sign a tax return which one does not believe to be true and correct as to every material matter.

The defendant can be found guilty of that offense only if all of the following elements are proved beyond a reasonable doubt: first, that the defendant made, signed

and filed the tax return described in the indictment; second, that the tax return contained or was verified by a written statement – let's read it again: that the tax return contained or was verified by a written declaration that it was made under the penalties of perjury; third, that the tax return was false as to a material matter; fourth, that when the defendant made and signed the tax return, he did so willfully and did not believe that the tax return was true and correct as to every material matter.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of this charge.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[143] It is not necessary that the government be deprived of any tax by reason of the filing of the return, or that it even be shown that additional tax is due to the government.

A declaration is false if it was untrue when made and was then known to be untrue by the person making it. The declaration contained within a document is false if it was untrue when the document was used and was then known to be untrue by the person using it.

The materiality of the alleged false statement is not a matter for you, the jury, to determine, but it is a question for the court to decide.

The false statement alleged in count 2 of the indictment is that the total income reported on the return did not contain substantial other income allegedly received by the defendant.

You are instructed that the false statements charged in the indictment, if they were made, were material statements. The government need not prove the exact amount of the additional money; it is sufficient if it proves beyond a reasonable doubt that the defendant has had income substantially in excess of the total income he reported on his return.

[144] I instruct you further that if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return.

I charge you that the word "willfully" as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law.

I charge you that the word "knowingly" as that term has been used from time to time in these instructions means that the act was voluntarily and intentionally – was voluntarily and intentionally and not because of mistake or accident.

I charge you further that intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind; but you

may infer the defendant's intent from the surrounding circumstances.

You may consider any statement made and done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of [145] mind.

I charge you further that the defendant contends that he was the victim of entrapment concerning the offense charged in Count 1 of the indictment.

I charge you that this defense is only applicable to the extortion charge as contained in Count 1.

A person is entrapped when he is induced or persuaded by law enforcement officers or their agents to commit a crime that he has no previous intent to commit. The law, as a matter of policy, forbids his conviction in such a case.

However, there is no entrapment where a defendant is ready and willing to break the law and the government agents merely provide what appears to be a favorable opportunity for the defendant to commit the crime.

For example, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to engage in an unlawful transaction with the defendant.

So, a defendant would not be the victim of entrapment if you should find beyond a reasonable [146] doubt the defendant was ready, willing and able to commit the crime charged in the indictment whenever opportunity was afforded and that the government officer or agent did no more than offer an opportunity.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the defendant had any intent to commit the offense except for inducement or persuasion on the part of some government officer or agent, then it is your duty to find the defendant not guilty as to Count 1.

All right, ladies and gentlemen of the jury, a separate offense or crime is charged in each count of the indictment. Each count and the evidence which pertains to it should be considered separately.

The fact that you may find the defendant guilty or not guilty as to one of the offenses should not affect your verdict as to any other offense charged.

I caution you, however, as members of the jury that you are here to determine the evidence in the case – let me try it one more time.

I caution you, members of the jury, that you are here to determine from the evidence in the case whether the defendant is guilty or not guilty.

[147] The defendant is not on trial for any other specific offense not charged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case.

If the defendant is convicted, the matter of punishment is for the judge to determine.

Any verdict that you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree; your deliberations

will be secret and you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss this case with one another in an effort to reach agreement, if you can do so. Each of you must decide this case for yourself, but only after full consideration of the evidence with the other members of the jury.

While you are discussing the case, do not hesitate to reexamine your own opinions and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, in a real sense, you are judges, judges of the facts. Your only interest is to seek [148] the truth from the evidence in the case.

When you go to the jury room, you should first select one of your number or one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you in court.

We have prepared a form of the verdict to be used as contained on this white sheet, and it has the caption of the case and it's entitled "verdict." I will explain it to you.

All right. It has two entries; each count must be decided, and that's listed separately on the form. It reads this way: We, the jury, find the defendant, and it says "blank" as to Count 1. The next is, we, the jury, find the defendant – and there's a blank – as to Count 2.

All right. You will take this form to the jury room; and if your decision is that the defendant is guilty as to Count 1, then the form of your verdict will be: We, the

jury, find the defendant guilty as to Count 1. If, on the other hand, as to Count 1, your verdict is not guilty, then the form of your verdict will be: We, the jury, find the defendant not guilty as to Count 1.

Moving to Count 2. If your decision is that [149] the defendant is guilty as to Count 2, then the form of your verdict will be: We, the jury, find the defendant guilty as to Count 2. If, on the other hand, as to Count 2 your verdict is – if you find the defendant not guilty, then the form of your verdict will be: We, the jury, find the defendant not guilty as to Count 2.

All right. You will take this verdict form to the jury room; and when you have reached a unanimous decision, you will have your foreperson fill in the verdict, date it and sign it and then return it to the courtroom.

If you should desire to communicate with the judge at any time, please write down your message or question and pass the note to the United States Marshal, or the court security officer, who will promptly return it to the judge for the judge's attention. I will then respond as promptly as possible either by bringing you back in the courtroom or giving you a written answer, as the case might be.

I caution you, however, with regard to any question you might send out that you should never state as to how your are divided numerically, if you are in fact divided, because that is not the business of the judge or the rest of the parties.

[150] All right. Now, you may retire to the jury room. Right now, don't do anything until you have heard from the judge. Just sit at ease back there.

You may retire.

(The jury exited the courtroom.)

THE COURT: All right. I will hear your exceptions to the charges.

MR. BEVER: Yes, there are, Your Honor.

The exceptions specifically will be with respect to government's submitted charges which were not given –

THE COURT: All right, sir.

MR. BEVER: – Those being the following charges: Government's request to charge Number 7 –

THE COURT: Yes, sir.

MR. BEVER: – Which was not given; request to charge Number 10, paragraphs six and seven, which was not given –

THE COURT: All right, sir.

MR. BEVER: – Government's request to charge Number 11, which was not given; the request to charge Number 15, 16, 17 and 18, which were not given; government's request to charge Number 21, which was not given; 23, which was not given; 24, which was not given.

[151] THE COURT: All right, sir.

MR. BEVER: Let me just see, your Honor, if there was – with respect to the Court's charge that was given

and the portion that is on the Hobbs Act, the charge which at the top starts "elements of the crime," on line 24, we except to "adverse effect on interstate commerce," and our position would be it should have been "interrupted," comma, "or affected interstate commerce."

Those are all of the exceptions which the government has.

THE COURT: All right, sir. Thank you, sir. The exceptions are considered, and they are in the record; I will let the charges stand as to the government.

For the Defendant?

MR. LOTITO: Your Honor, first as to defendant's requested instruction 13 as to interstate commerce, we believe that the language in the Flom case should have been included in the interstate commerce instruction as to the coming to rest doctrine; that the issue has been taken from the jury as to – it should be in addition to whether the jury believed the evidence as stated, but there also should be a jury issue as to whether the articles coming into [152] the state from outside of Georgia came to rest –

THE COURT: Yes, sir.

MR. LOTITO: – Within Georgia and were purchased by the Dekalb County people and then resold to potential developers; that that coming to rest doctrine could be an interruption in interstate commerce –

THE COURT: Okay.

MR. LOTITO: – Under Flom.

The second exception as to the definition of "campaign contributions" in the Court's charge, the language

that says that "If a public official demands or accepts money in exchange for specific requested exercises of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." We believe the language "in exchange for specific requested exercises of his official power" is inconsistent with the holding in Dozier, the Fifth Circuit Case in 1982, 672 Fed.2d 531; that it improperly focuses on the motives of the contributor instead of on the intent of the public official, or the recipient, and the page references were 537 and 542 of the Dozier opinion.

We think the language should have been [153] clearer if it were stated that the money was accepted with an agreement to perform official action as to – in place of the language "Requested exercises of official power."

THE COURT: All right, sir. Yes, I'm familiar with Dozier.

Go ahead.

MR. LOTITO: The third exception that we would make to the charge is that while the court's instruction on defining a campaign contribution was proper, it didn't go quite far enough to the facts of this case.

We believe that "contributions" should have also been defined to include contributions to the – to a district office would have been political contributions, so long as the funds were utilized for the purposes of operating a district office.

THE COURT: All right, sir.

MR. LOTIO: Those would be our exceptions to the Court's charge.

THE COURT: Okay. Thank you.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	Case Number: CR88-269A
JOHN H. EVANS, JR.	Dated May 17, 1989

(Name and Address of Defendant) Michael C. Abbott, Nicholas Lotito and Seth Kirschenbaum
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[[ ] guilty [ ] nolo contendere] as to count(s) ___, and [xx] not guilty as to count(s) 1 & 2.

THERE WAS A:

[[ ] finding [xx] verdict] of guilty as to count(s) 1 & 2.

THERE WAS A:

[[ ] finding [ ] verdict] of not guilty as to count(s)___.

[ ] judgment of acquittal as to count(s)_____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Extortion and Income Tax Fraud, in violation of Title 18, USC, 1951 and Title 26, USC, 7206(1).

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant be sentenced to the Custody of the Attorney for 18 months on count 1 pursuant to Title 18, USC, Sect. 4205(b)(2). As to count 2, 18 months with the execution of sentence suspended and defendant placed on probation for FOUR (4) YEARS with the special conditions that 1) he shall not seek nor hold public office during the probation period and 2) defendant must cooperate with the Internal Revenue Service in getting his tax matters settled.

IT IS FURTHER ORDERED that the defendant may vōluntary [sic] surrender to the institution as desiganted [sic] by the U.S. Marshal no later than June 16, 1989.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify you probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence:

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1 & 2 as follows: $50.00 on each count

IT IS FURTHER ORDERED THAT counts ___ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and recommends: that the Attorney

General designated the Federal Prison Camp, Atlanta, Georgia as the place of service for this sentence.

May 16, 1989
Date of Imposition of Sentence

/s/ Horace T. Ward
Signature of Judicial Officer

HORACE T. WARD, U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

5/17/89

Date

(Return Omitted In Printing)

United States Court of Appeals
Eleventh Circuit.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John H. EVANS, Jr.,
Defendant-Appellant.

No. 89-8631.

Sept. 6, 1990.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

John H. Evans, Jr. appeals his conviction on one count of attempted extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951, and one count of subscribing to a materially false federal income tax return for 1986 in violation of 26 U.S.C. § 7206(1). We affirm his convictions on both counts.

BACKGROUND

In early 1985, Clifford Cormany, Jr. ("Cormany"), a special agent with the Federal Bureau of Investigation ("F.B.I.") was assigned to Atlanta to assist in conducting an undercover investigation, to be known as "Operation Vespine," into allegations of public corruption in the Atlanta area, particularly in the area of rezoning of properties. Using the identity of "Steve Hawkins," Cormany represented himself, as a land developer of the company

WDH, who had recently moved to the Atlanta area. Cormany told other people that he represented a group of investors that was considering developing various land projects in DeKalb County.

In March of 1985, Albert E. Johnson, who was a subject of the investigation,[1] arranged a meeting between Cormany and John H. Evans, a member of the Board of Commissioners in DeKalb County. During this meeting, Johnson told Evans that Cormany's investment group was looking for assistance with matters related to rezoning and variances.

Subsequently, between August, 1985, and October, 1986, a series of meetings and telephone conversations between Evans and Cormany ensued. Almost all of these meetings and conversations were videotaped or audio taped, and they formed a substantial part of the evidence presented by the government at trial.

During the first of these meetings, in August of 1985, Evans was informed by Johnson and Cormany that Cormany wanted to let his investment group know that it had a "leg up" on other developers in DeKalb County. He aimed to achieve this "leg up" by letting the developers know that WDH was associated with the bodies that governed such things as zoning requests. Evans agreed to help set up meetings for Cormany and Johnson with other commissioners.

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[1] Johnson did not learn of Cormany's true identity until November of 1985, at which point Johnson agreed to assist in the investigation.

Evans was contacted nine months later, in May of 1986, at which time Johnson and Cormany informed him that they wanted to get an area zoned for the highest density possible and that they were willing to do whatever was needed in order to get the zoning passed. There was also discussion of Evan's campaign for reelection which was just getting off the ground. In response to a query from Johnson about what size contribution would be considered meaningful, Evans replied that at a recent fundraising event, contributors were encouraged to give a thousand dollars apiece. Johnson then asked whether Evans needed any "expense money." Evans stated that he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that it would cost him about $260 and Cormany wrote out a check to Evans for a $300 contribution. Evans used this money to buy the list and sent a thank-you note to Cormany.

In July, 1986, Cormany and Johnson met Evans for lunch and informed him that they had a particular tract of land in mind that they wanted to get rezoned to a higher density. They told Evans that expense monies would be available for Evans if needed. Evans recommended that they meet with members of the DeKalb County Planning Department so they could get their rezoning application filed as soon as possible.

On the morning of July 23, 1986, Evans called Cormany at his undercover apartment. The parties disagree as to whether Evans initiated this call. At trial, Evans testified that he was returning a call that had been placed by Cormany. Cormany testified that the call he received was unsolicited. This call was not recorded. Cormany testified that he did not record the call because he was

not expecting a call at his home and had not set up any recording equipment. Cormany further testified that at the end of the conversation, which concerned the filing of the zoning petition, Evans replied that he was "running hard and pulling teeth." Cormany testified that he thought that Evans's references to his campaign were an attempt to discuss money opportunities with him in connection with his rezoning efforts. Later that day, Cormany and Evans spoke again in order to arrange a meeting for the next day. According to Evans, Cormany also told him to bring an indication of his campaign needs. Cormany denied that he asked Evans to prepare any list. This conversation also was not recorded.

Cormany and Evans met on July 24, at which time Cormany informed Evans that there was a "generous budget for anything we do." Evans then produced a document which he referred to as the "draft constitution of the United States," which contained his campaign budget from June 29 to August 12, the date of the primary. The document apparently showed his outstanding campaign debts as well as an estimate of his anticipated campaign expenses throughout the primary. Evans stated that of his $14,180 budget, he had received $6,295, leaving a shortfall of $7,885. At this point the following conversation ensued:

> Cormany: Can I can I talk frankly with you . . .
>
> Evans: Yeah.
>
> . . . .
>
> Cormany: And, and this is between you and I. I need, I desperately need, your help and your support on this project. You, I'm in one business, you're in another.

Evans: Yeah, yeah you got me.

Cormany: You're, you're the influence you have over there, and the assistance you have over there, I can probably cover that for you.

Evans: Well, let me tell you. I, it's it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that.

Cormany: You're talking about seven eight eighty-five.

Evans: Right.

Cormany: That's the balance of what the . . .

Evans: Of what the budget was from June 29th through August 12.

Cormany: But, what I'm asking you John, I mean, is if I pick up the entire amount, I mean, does that, would that satis – would that be a reasonable relationship, a reasonable

. . . .

Evans: Oh, I'll, let me make sure, and I understand both of us are groping . . .

Cormany: Yeah.

Evans: . . . for what we need to say to each other.

Cormany: All I want . . . let me, let me kinda . . .

Evans: I'm gonna work. Let met tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean.

Cormany: Yeah.

Evans: If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.

Cormany: I understand.

Evans: You see, what I'm doing is giving you is a fair assessment of what my needs are to be re-elected on August 12.

Cormany: Okay.

After some intermediate conversation, the interchange continued as follows:

Cormany: You need cash?

Evans: Yeah . . .

Cormany: Check?

Evans: I think we better do it that way.

Cormany: Cash?

Evans: Yeah. I think so in this case.

Cormany: Okay.

Evans: I think so, so there won't be any, any, tinges, or anything.

Cormany: Okay.

Evans: Or, we can do this.

Cormany: You, you, tell me how you prefer it done?

Evans: I mean, let me, let me tell ya'.

Cormany: I can write the check . . .

Evans: I know.

Cormany: Or I can give you, I can give you . . .

Evans: Okay, I'll tell you now, we don't have to do that. What you do, is make me out one, ahh, for a thousand.

Cormany: Make you out a check for a thousand?

Evans: And, and that means we gonna record it and report it and then the rest would be cash.

Cormany: The rest will be cash?

Evans: Yeah.

Later in the meeting, the conversation continued as follows:

Cormany: But, I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way.

Evans: I understand. Oh, I understand that.

Cormany: And you and I would have a budget either way.

Evans: Either way, yep. Oh, I understand that. I understand.

Later that day, Cormany tried to file the application for rezoning of the property, but the application was rejected because the property had been rezoned less than two years before. Evans and Cormany met on July 25, at which time the conversation centered around whether or not this two-year requirement could be waived. At this meeting, Cormany gave Evans $7,000 in cash, which Evans place in an envelope, and a check for $1,000 payable to the "John Evans Campaign." Evans locked the $7,000 in cash in a drawer in a file cabinet in his campaign office. Evans did not at that time record the $7,000

in cash given to him by Cormany on his books nor on the required state disclosure form. Evans did not report the $7,000 he received from Cormany in his 1986 tax return.

At the August 12 DeKalb County Commission meeting, the waiver was granted by a vote of 4 to 0. On August 27, Cormany filed his application for rezoning. On August 28, Cormany informed Evans that approval of the application would require an amendment to the comprehensive land use plan from low density residential to medium residential.

In early October of 1986, the county's Planning Department recommended denial of Cormany's application to amend the land use plan. On October 28, Cormany decided to end the project by withdrawing the zoning application without prejudice, and the Commission agreed to allow the application to be withdrawn.

On October 7, 1987, F.B.I. Special Agents Clarence Joe Tucker and Gary Morgan interviewed Evans at his office. Evans was informed that the agents wished to ask him about campaign contributions he had received from developers. Evans told agents that Cormany had given him a campaign contribution of $1,000 and that all of the contributions he received from individuals were reflected on his campaign disclosure reports. Evans failed to mention the additional $7,000 in cash that he had received from Cormany.

Testimony at trial indicated that at the end of his campaign. Evans had a surplus of over $7,000 including

the money that he had received from Cormany.[2] He testified that he used $4,100 to repay a campaign debt to his mother, in cash, in November of 1986. He testified that he used the remaining $2,900 to repay himself in December of 1986, for loans that he had made to his own campaign over the years 1982-86. Evans became aware of the undercover investigation in November of 1987. The repayments of loans occurred before Evans became aware of the undercover operation. Evans did not, however, record these payments in his books or amend his state disclosure forms until after he knew that he was under investigation.

DISCUSSION

A. *Instruction to the Jury on the Law of Extortion under Color of Official Right*

Evans claims that the district court's instruction to the jury on Count I, extortion "under color of official right." was erroneous in that it did not require the jury to find that Evans *conditioned* his support for Cormany's project on the receipt of some type of payment from Cormany. In other words, Evans claims that the crime of extortion under color of official-right requires that a public official initiate some action which induces the victim to part with money or property. Upon review of the charge given to the jury, we find that it correctly sets

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[2] Although Evans had spent almost $7,000 more than the $14,000 projected budget for June 30 to August 12 that he showed Cormany, he had also raised approximately $28,000 ($14,000 more than expected), including the cash contributed by Cormany.

out Eleventh Circuit law on the elements required for conviction of the crime of extortion under color of official right.

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part that "whoever . . . affects commerce . . . by . . . extortion shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

In this case, the judge instructed the jury as follows:

> The defendant can be found guilty of [18 U.S.C. § 1951] only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.
>
> Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.
>
> Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.
>
> So, if a public official *agrees* to take or withhold official action or [sic] the wrongful purpose

of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.

. . .

The defendant contends that the $8,000 he received from Agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or *accepts* money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

(emphasis added).

Evans's first contention is that the court erred in using the words "agrees" and "accepts" italicized above. He points out that the Eleventh Circuit Pattern Jury Instruction states that "if a public official *threatens* to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a *threat* would constitute extortion. . . . " Evans claims that the distinction between "threaten" and "agree" is a crucial one: the former, he contends, is a "condition precedent" whereas the latter implies "mere acquiescence." Evans argues that the instruction given by the judge was impermissibly "watered down" because a section 1951 violation

requires that the payment of money be induced, i.e. that the defendant condition the performance of some official act on payment of money. He states that the overall charge in this case eliminated the requirement of inducement.

We agree with Evans's observation that the charge permitted the jury to convict Evans without finding that he conditioned the performance of an official act upon payment of money. Under the law of this circuit, however, passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.[3]

Eleventh Circuit law governing the crime of extortion under color of official right was first set out by the former Fifth Circuit in *United States v. Williams*, 621 F.2d 123 (5th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981).[4] In *Williams*, the court stated that:

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[3] This is also the law of the majority of circuits that have addressed the question. *See United States v. Aguon*, 851 F.2d 1158, 1177 (9th Cir.1988) (en banc) (Wallace, J. dissenting) (collecting cases). It will remain the law of the Eleventh Circuit unless the Supreme Court or the Eleventh Circuit sitting en banc decides otherwise. Only the Second and Ninth Circuits have required an act of inducement by a public official. *See United States v. O'Grady*, 742 F.2d 682, 687-89 (2d Cir.1984) (en banc) and *Aguon*, 851 F.2d 1158.

[4] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as

(Continued on following page)

> The language, "under color of official right," is consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color of his office, with no proof of threat, force or duress required. The coercive element is supplied by the existence of the public office itself.

Id. at 124 (citations omitted).

Evans argues that the Eleventh Circuit decision of *United States v. O'Malley*, 707 F.2d 1240 (11th Cir.1983) stands for the proposition that inducement is still required in a case involving extortion under color of official right. We agree that *O'Malley* speaks in terms of inducement, but note that the decision makes clear that the requirement of inducement is *automatically* satisfied by the power connected with the public office.[5] Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." *Id.* at 1248; *see also United States v. Glass*, 709 F.2d 669, 674 (11th Cir.1983) (coercive nature of official office takes the place of fear, duress, or threat).

In *United States v. O'Keefe*, this circuit reiterated that "[i]n a Hobbs Act prosecution of a public official, the

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precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[5] It appears somewhat academic to argue whether inducement is still required if inducement is automatically present by virtue of the official's position. A condition that is always satisfied ceases to be a true condition.

Government's burden is simple: it must prove that the public official obtained property from another in exchange for performance of his official duties." 825 F.2d 314, 319 (11th Cir.1987); *see also United States v. Sorrow*, 732 F.2d 176, 179 (11th Cir.1984) (compulsion not a necessary element in Hobbs Act prosecution of a public official); *United States v. Swift*, 732 F.2d 878, 880 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 905, 83 L.Ed.2d 920 (1985) (same).[6]

Evans, while acknowledging that the Fifth Circuit's decision in *United States v. Dozier*, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982), is not binding on this court, relies heavily on that decision for the proposition that extortion under color of official right requires that a public official make performance or non-performance of an official act contingent upon the payment of a fee. While this accurately described the conduct at issue in *Dozier*, that court made clear that the Hobbs Act was not limited to such behavior, but that:

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[6] The Seventh Circuit, in a case cited with approval in *Sorrow*, 732 F.2d at 180 and in *Swift*, 732 F.2d at 880, upheld a trial court instruction that "[i]f the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient." *United States v. Hedman*, 630 F.2d 1184, 1194 n. 4 (7th Cir.1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981). The Seventh Circuit found that the instruction was not erroneous, stating that "it is unnecessary to show that the defendant induced the extortionate payment." *Id.* at 1195.

> [i]t matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.

672 F.2d at 539 (quoting *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir.1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1562, 43 L.Ed.2d 775 (1975)); *see also United States v. Westmoreland*, 841 F.2d 572, 581 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988) (citing *Dozier* and reiterating that a public official may violate the Hobbs Act merely by accepting money in return for a requested exercise of official power); *United States v. Wright*, 797 F.2d 245, 250 (5th Cir.1986), *cert. denied*, 481 U.S. 1013, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987) (same). Thus, despite Evans's protestations otherwise, we find the Fifth Circuit's position stemming from its interpretations of the *Williams* decision entirely consistent with that of the Eleventh.

As an alternative argument, Evans requests that this panel revisit the Eleventh Circuit position on extortion under color of official right, suggesting that the circuit's holdings do not comport with the legislative history and plain meaning of the statute, and that Eleventh Circuit precedents such as *O'Keefe* and *O'Malley* conflict and cannot be reconciled. We see no inconsistency in Eleventh Circuit precedent on this question and further note that prior decisions of panels of the Eleventh Circuit may only be overruled by the *en banc* court or the Supreme Court.

See United States v. Machado, 804 F.2d 1537, 1543 (11th Cir.1986).

Evans also contends that the instruction was "so confusing, contradictory and ambiguous" that it deprived him of a fair trial. Specifically, he argues that the charge as given did not provide a clear statement regarding the mens rea required by Evans in that it appeared to focus on the actions and intention of the contributor instead of on the actions and intention of the defendant. He states that the charge would allow the jury to convict regardless of whether Evans knew that Cormany's motivation for giving him the money was an improper one.

In order to secure a conviction under the Hobbs Act, the government must demonstrate, among other things, that the public official *knew* that the payment he received was motivated by a hope of influence. We agree with Evans that the charge given by the court did not express this requirement as clearly as it might have.[7] The court did state, however, that the public official must agree to take official action "for the *wrongful purpose* of inducing a victim to part with property." (emphasis added). Further the instruction on Count I informed the jury of the mens rea required by stating that the government must prove beyond a reasonable doubt "that the defendant induced

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[7] In *Hedman*, 630 F.2d at 1184 n. 4, the jury was specifically told that they could only convict "[i]f the public official knows the motivation of the victim focused[d] on the public official's office." *See also United States v. Nedza*, 880 F.2d 896, 902 n. 13 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 334, 107 L.Ed.2d 323 (1989). Such an instruction more clearly spells out the mens rea required than the instruction given in this case.

the person . . . to part with property . . . knowingly and willfully by means of extortion. . . . "[8]

The district court has broad discretion in formulating the charge to the jury, and the court of appeals will not reverse "unless, after examining the entire charge, the Court finds that the issues of law were presented inaccurately, . . . or the charge improperly guided the jury in such a substantial way as to violate due process." *United States v. Turner*, 871 F.2d 1574, 1578 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989). In this case, we find that, taken as a whole, the charge given by the trial judge properly guided the jury and did not offend due process.

B. Admission of the Government Chart into Evidence

Evans claims that the district court erred in admitting a government chart and foundation testimony into evidence that purported to summarize the defendant's finances. The standard regarding determinations of admissibility of evidence is whether there is a clear showing of an abuse of discretion. *United States v. Roper*, 874 F.2d 782, 790 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 369, 107 L.Ed.2d 355 (1989). For the reasons discussed below, we find that the district court acted well within its discretion in admitting the Robertson chart and the accompanying foundation testimony.

At trial, Thomas Huhn, a private investigator, testified as a summary witness for the defense. Huhn stated

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[8] The court further instructed the jury on the meaning of the words knowingly and willfully.

that he had examined Evans's ledger books, which comprised Evans's office and campaign record keeping system from 1982 to 1987, in order to determine how much money Evans had personally loaned to his campaign or district office and what repayments were made from the office or campaign back to Evans. On the basis of this examination, Huhn prepared a chart ("the Huhn chart"), which was admitted into evidence. Testifying from this chart, Huhn stated that after Evans had repaid himself $2,900 from the Cormany cash, the campaign and district office still owed Evans approximately $1,235 as of December 31, 1987.[9]

The apparent point of Huhn's testimony and chart was to demonstrate that Evans did not report the $7,000 he received from Cormany on his income tax returns because any money Evans had been repaid for his own loans to his office would not be income and therefore would not have to be reported to the I.R.S.[10]

Prior to Huhn's testimony, Evans had testified that DeKalb County paid each commissioner, including Evans, $100 per month for incidental expenses such as parking fees, gas, mileage, lunches, etc. The County did not require the commissioners to designate how this expense

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[9] Huhn testified that there were approximately 376 entries for loans from Evans to the campaign and district office and a total of 44 repayments from the campaign and district office to Evans.

[10] The court charged the jury that "if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return."

money was used. Evans testified that he had not reflected these $100 per month payments from DeKalb County in his office ledger. Instead, he deposited the checks for $100 in his personal account, and he claimed the resulting income of $1,200 per year on his tax return each year as business reimbursements for car related expenses.

In its rebuttal case, the government introduced testimony from Ted Malcolm Robertson, a special agent with the I.R.S. Robertson testified that, in his opinion, the $100 per month that Evans had received during the period 1982 to 1987 should have been reflected in his ledgers in order to arrive at an accurate assessment of the amounts owed to or owing from Evans to his campaign and district office. Robertson stated that he had concluded that every item that had been expensed on behalf of Evans was reflected in Evans's ledger books, including expenses for transportation.[11] Robertson testified that he had made a summary chart ("the Robertson chart") which adopted the figures in the Huhn chart, but added in the $100 per month that Evans had received from DeKalb County. On the basis of this chart, Robertson testified that as of December 31, 1987, Evans actually owed his campaign and district office over $4,700.

According to the government, the Robertson chart was introduced to rebut Evans's reasons for not reporting the money to the I.R.S. by showing that Evans could not have believed that he was merely repaying himself a debt. The government sought to show that at the time

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[11] Evans had testified that among the items that he included as loans from himself to the campaign were items for car expenses such as gasoline and related matters.

Evans repaid himself, he was not owed any money from his district and campaign office.

Evans objected to Robertson's testimony and to the Robertson chart on several grounds. He claimed that the chart was irrelevant, erroneous, and argumentative, that it did not meet the requirements of Fed.R.Evid. 1006, and that it resulted in a variance as to Count II of the indictment. The district court overruled Evans's objections to the testimony and the chart as well as Evans's motion for a mistrial based on his variance argument.

Evans claims that the Robertson chart was irrelevant because the $100 per month expense money given to each Commissioner by DeKalb County had nothing to do with Evans's office or campaign records or accounts. He claims that the chart was erroneous because the government was allowed to insert the $100 per month payments into Evans's bookkeeping system for his office without taking into account any of the expenses for which the money was used. Evans argues strenuously that the record demonstrates that he used the $100 per month for car expenses and that he accordingly expensed the $100 per month on I.R.S. form 2106 as an employee business expense. He points out that the evidence showed that he did not claim depreciation, mileage, insurance, gasoline, oil or other expenses on his cars from his campaign and district office account, and that Robertson himself admitted on cross examination that he had not found a single charge in the campaign and district office records for such expenses for any car driven by either Evans or his wife, who served as his campaign manager. Evans claims that as a result of Robertson's testimony, the jury was erroneously led to believe that Evans had repaid himself

$6,000 more from his office and campaign loans than was the case.

Finally, Evans claims that the chart was argumentative because the government labeled the DeKalb County money "*re* payments" to Evans to make it correspond to the other repayments Evans received for his loans to his campaign and district office, even though there was evidence that the money was not used in this manner. He argues that he had demonstrated that the DeKalb County money was not a repayment but rather an advance for routine expense payments.

We agree with Evans that the testimony by Robertson was contradicted by other evidence at trial. We find, however, that this does not render the admission of the government's evidence irrelevant or erroneous. In an adversarial proceeding, it is not unusual for testimony offered by one side to be contradicted by testimony offered by the opposing side.[12] Here, the jury was presented with the evidence of both sides and was allowed to draw its own conclusions as to whether the $1,200 per year should have been added to the defendant's summary of the repayments made to himself from his campaign and district office. Evans had the opportunity,

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[12] In his briefs before this court, Evans states that "the government knew that its initial premise attempting to justify the infusion of the $6,000 into Evans' campaign and office account was in fact false" and that "the government's efforts can only be characterized as disingenuous sleight-of-hand to irreparably sabotage the defendant's theory of the case." Despite such assertions, we do not understand Evans to be raising the claim that the government knowingly used perjured testimony.

through cross examination and surrebuttal,[13] to demonstrate that the government's theory was false. The fact that the government tenders unpersuasive evidence does not mean that the admission of evidence was error. Indeed, trial counsel may have been able to turn the tables on the government by showing that the government was putting forth a theory that lacked foundation.

Evans also argues that the chart was not a "summary" within the meaning of Fed.R.Evid. 1006[14] because the DeKalb County payments were not so voluminous that they could not conveniently be examined in court.

Evans is constrained to argue only that the *additional* payments of $1,200 were not a "summary" because, of course, the chart, minus those payments, had already been admitted as a summary chart during presentation of the defense. We find that the district court did not abuse

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[13] After the close of evidence, defense counsel argued that it should be allowed to recall Evans in surrebuttal to challenge testimony on this point. Over the government's objection, the court ruled that it would allow Evans to retake the stand for the limited purpose of explaining how he spent the $1,200 he received each year from DeKalb County to defray his expenses. Counsel then decided not to proceed with any surrebuttal.

[14] Fed.R.Evid. 1006 states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

its discretion in admitting the chart as a summary, as it brought together a total of sixty $100 per month payments that Evans received over a five year period.

Finally, Evans argues that the testimony of Agent Robertson set forth an impermissible variance from the charge and the proof. Robertson testified, based on the chart, that when the DeKalb County payments were included, Evans had already taken over $1,100 of undeclared income without regard to what he did with $2,900 from the cash given to him by Cormany. Evans claims that if this evidence were accurate, the jury could believe Evans's testimony as to what he did with the Cormany cash and still convict him.

In *Stirone v. United States*, 361 U.S. 212, 215-16, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960), the Supreme Court stated that the grand jury's charges may not be broadened through amendment except by the grand jury itself. We conclude that *Stirone* has no bearing on the case before us, as it speaks to the situation in which the trial court gives an instruction which expands the jury charge to include additional illegal acts not charged in the indictment. In the instant case, the judge specifically instructed the jury that "the defendant is not on trial for any other specific offense not charged in the indictment."[15]

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[15] Count II of the indictment charged in relevant part that Evans filed a tax return "he did not believe to be true and correct as to every material matter in that . . . the Evans's adjusted gross income in 1986 was at least $35,739.67 *as a result of a $7,000 cash payment he received from Clifford Cormany a/k/a Steve Hawkins.*" (emphasis added).

In *United States v. Gold*, 743 F.2d 800 (11th Cir.1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985), we made clear that "properly understood . . . a variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegation." *Id.* at 813 (emphasis in original); *see also United States v. Champion*, 813 F.2d 1154, 1168 (11th Cir. 1987) (government's evidence related to uncharged shipments of marijuana during time of indicted conspiracy did not constitute impermissible variance from the indictment). Here, there was no variance warranting a mistrial and the district court properly denied the motion.

C. *Refusal to give an Entrapment Charge on the Tax Fraud Count*

Evans claims that the district court erred in refusing to charge the jury on entrapment with respect to Count II of the indictment, which charged Evans with subscribing to a false tax return for 1986.[16]

A defendant is entitled to have presented instructions relating to a theory of defense "for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir.1986) (quoting *United States v. Young*, 464 F.2d 160, 164 (5th Cir.1972) (emphasis added)). In order to raise the issue of entrapment, a defendant must come

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[16] An entrapment charge was given on Count I.

forward with some evidence that "the government's conduct created a substantial risk that the offense would be committed by a a person other than one ready to commit it." *United States v. Parr*, 716 F.2d 796, 802-03 (11th Cir.1983) (citations omitted); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir.1985), *cert. denied*, 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed.2d 789 (1986). Therefore, in reviewing a district court's failure to instruct the jury on a theory of entrapment, we look to see whether the court correctly concluded that the defendant failed to present more than a scintilla of evidence in support of an entrapment defense.

Evans first contends that the evidence that was sufficient to authorize the entrapment charge on the extortion count (Count I) would also authorize it on the count of failure to report $7,000 as income (Count II). Evan's argument appears to be that when he was entrapped into extorting the money, he was simultaneously entrapped into not recording $7,000 of it as a campaign contribution. He goes on to argue that once he decided not to record that money as a campaign contribution, he was "logically" foreclosed from disclosing it to the I.R.S. We find this argument, though creative, to be without merit. First, while there may be evidence sufficient to support a charge of entrapment on the general offense of extortion, there is no evidence that the government played any role in Evans's decision, after receiving the $8,000, to record only $1,000 as a campaign contribution. Even if such evidence existed, Evans's subsequent decision not to declare the additional $7,000 on his income tax form was wholly separate from his decision not to record it in this campaign ledgers. Thus, we find that the giving of an

entrapment charge on Count I in no way required the court to give an entrapment charge on Count II.

Evans also argues that his entrapment defense is supported by the transcript of his July 24, 1986, meeting with Cormany at which Cormany requested that the payment not be disclosed. Evans contends that when he responded that he would not disclose the $7,000, he "clearly signaled his future intention with regard to disclosure to the I.R.S."

We need not reach the question of whether a mere request by a government agent not to disclose money to the I.R.S. would provide a sufficient basis for an entrapment charge, for our review of the transcript and the videotape convinces us that Cormany made no such request.[17] Although Cormany requested that Evans not

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[17] The transcript of the conversation, in relevant part, was as follows:

> Cormany: Okay. Now this, listen, when I say this is between you and I . . .
>
> Evans: Okay.
>
> Cormany: . . . John, let me tell you something, I mean . . .
>
> Evans: Won't say a word
>
> Cormany: I don't mean Al [Johnson], I mean, I prefer to have it that way. Not that I don't trust Al.
>
> Evans: Period. No, no, no.
>
> Cormany: And, and . . .

(Continued on following page)

inform anyone of the transaction, at no point did Cormany suggest or request that Evans not report the money to the I.R.S. in his tax return. Thus, there is no basis to conclude that Cormany's request for confidentiality "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *Parr*, 716 F.2d at 802-03. We hold that the district court correctly ruled that Evans's showing of entrapment was insufficient as a matter of law to send the issue to the jury and that it did not err in refusing to give an entrapment charge with respect to Count II.

(Continued from previous page)

Evans: Period.

Cormany: Bob [Howard] don't need to know.

Evans: Nobody.

Cormany: Okay?

Evans: You can count on it.

. . . .

Cormany: I just saw, ah, Al show up, so this . . .

Evans: Oh.

Cormany: . . . This is between you and I.

Evans: No problem.

Cormany: Then, I mean. My accountant will find out I made a thousand dollar contribution from my check book.

Evans: Yeah, fine, fine.

Cormany: We got so much, so many different accounts and everything, I mean, you know . . .

Evans: (Laughs)

Cormany: He won't, he won't even miss the rest of it.

D. Exclusion of Testimony by Dr. Robert Shuy

Evans's final claims concern two evidentiary rulings by the district court limiting the evidence that the defense was allowed to put before the jury.

First, Evans argues that the district court abused its discretion in refusing to permit the defense expert on linguistics, Dr. Roger W. Shuy, to assist the jury in examining in court the eighteen tapes admitted into evidence. Dr. Shuy was presented as an expert in the field of conversation or discourse analysis. The defense offered Dr. Shuy to testify about the structure of conversation including such concepts as "topic isolation," "response analysis," "feedback markers," and the "contamination principle."[18] The defense also sought to introduce, pursuant to Fed.R.Evid. 1006, five charts showing Dr. Shuy's conclusions about certain "themes" that recurred throughout the conversations. The court ruled that Dr. Shuy would not be permitted to testify.

Evans claims that the testimony would have helped the jury determine whether it was more or less probable that Evans understood the illegal nature of the plan through reference to specific taped conversations. As far

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[18] At the trial court's evidentiary hearing on the proffer of this evidence, Dr. Shuy testified that "topic analysis" refers to identification of the major themes of the speakers in the conversation which indicate the agenda of the speakers, that "feedback markers" are responses such as "Uh huh" which may or may not mean "I agree with what the speaker is saying," and that the "contamination principle" is the process by which a listener becomes contaminated in the eyes of a third party listener/observer by the actions of the speaker.

as the summary was concerned, Evans argues that the only way to review multiple and lenthly tape sequences is by means of a chart or summary. He notes that the expert was able listen to the tapes repeatedly, whereas the jury heard the tapes only once at trial. He argues that the summary charts, which dealt with broader themes over a period of time, could only be assembled after an extensive review that no jury would have the ability to undertake.[19]

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence.[20] Under this rule, prior to admitting expert testimony, "the trial judge must determine that the expert testimony will be relevant and will be helpful to the trier of fact." *United States v. Piccinonna*, 885 F.2d 1529, 1531 (11th Cir.1989) (en banc) (footnotes omitted). We have stressed that, in deciding whether to admit testimony, "a trial judge must be sensitive to the jury's temptation to allow the judgment of another authority to substitute for its own." *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988).

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[19] As an example, he notes that a summary would have demonstrated that Cormany or Al Johnson offered Evans money at thirty different times over the course of the investigation.

[20] Fed.R.Evid. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In this case, the district court held an extensive evidentiary hearing regarding the defendant's proffer of Dr. Shuy's testimony. In deciding not to admit the testimony, the court concluded that while a jury in an appropriate case might be aided by testimony from a linguistic expert, the case at bar was not appropriate for such testimony. The court based this conclusion on several grounds. First, it noted that the recordings and transcripts that formed the basis of Dr. Shuy's conclusions were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. The court also found that the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors. Finally, the court found that the testimony could be confusing and misleading to the jurors because it took matters out of context and, in some instances, was in the nature of conclusions regarding the appropriate interpretations to make of the recorded conversations.

We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony. In considering whether the expert would aid the jury's ability to understand the taped conversations and whether the danger of jury confusion outweighed the testimony's probative value, the court engaged in the correct inquiry. *Cf. United States v. Schmidt*, 711 F.2d 595, 598 (5th Cir.1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 705, 79 L.Ed.2d 169 (1984) (refusal to admit expert testimony of linguistics expert not an abuse of discretion where court concluded that testimony would not assist jury); *United States v. Devine*, 787 F.2d 1086, 1088 (7th Cir.), *cert. denied*, 479 U.S. 848, 107

S.Ct. 170, 93 L.Ed.2d 107 (1986) (not error to refuse to admit linguist's testimony where contents of tape recorded conversation not outside the average person's understanding); *United States v. DeLuna*, 763 F.2d 897, 912 (8th Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (no error to refuse proffered expert testimony on discourse analysis). Further, our review of the evidentiary hearing on the admissibility of the expert testimony convinces us that the district court's findings on these matters were well supported. In this case, questions regarding the defendant's understanding of the illegality of the operation and the extent of government inducement were at the center of the trial. The jury's task was to determine, on the basis of its collective experience and judgment, what Evans's state of mind was when he accepted the money and whether he was entrapped into committing the crime for which he was charged. We agree with the district court that expert testimony would not have aided the jury in performing this task and that the testimony presented a risk that the jury would allow the judgment of the expert to substitute for its own.

In refusing to admit the expert's charts as a summary pursuant to Fed.R.Evid. 1006, the court found that certain of the headings of the charts impermissibly reflected the expert's opinion as to the content of the recorded testimony that had previously been presented to the jury. We hold that the district court did not abuse its discretion in refusing to admit the proffered charts on this basis, as a summary of the tapes would necessarily entail judgments about the content of the conversations.

E. Refusal to Allow Cross-Examination of Agent Cormany on the Attorney General's Guidelines on F.B.I. Undercover Operations

Evans also claims that the district court abused its discretion in prohibiting cross-examination of Agent Cormany on the Attorney General's internal guidelines on F.B.I. undercover operations. Evans argues that such an examination would have aided the jury in deciding whether he was entrapped, as it would have shown the degree to which the F.B.I. strayed from the regulations that should have governed its conduct. He argues that the guidelines provide standards to assist the jury in evaluating whether or not the government adhered to minimum standards of fairness.

Evans admits that this is not a case where an agency is required to adhere to its own regulations under penalty of having its actions nullified. *Cf. United States v. Pacheco-Ortiz*, 889 F.2d 301, 307-11 (1st Cir.1989) (discussing judicial sanctions for Department of Justice's failure to follow internal guidelines regarding warnings to targets called before the grand jury). He argues, however, that the government should not be permitted to conceal from the jury the F.B.I's violation of its own rules in an effort to snare a citizen.

We conclude that these guidelines were not of sufficient relevance to the jury's determination on the question of entrapment to warrant their admission. The defense of entrapment concerns only the defendant's lack of predisposition to commit the crime. "Where a defendant is predisposed to commit a crime, he cannot be entrapped, regardless of how outrageous or overreaching

the government's conduct may be." *United States v. Rey*, 811 F.2d 1453, 1455 (11th Cir.), *cert. denied*, 484 U.S. 830, 108 S.Ct. 103, 98 L.Ed.2d 63 (1987) (*citing Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976)). Given the guidelines' lack of probative value on the issue of entrapment, we hold that the district court's decision to disallow cross-examination was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the defendant's convictions on both counts of the indictment are AFFIRMED.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 89-8631

D.C. Docket No. CR 88-269A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN H. EVANS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of

conviction of the said District Court in this cause be and the same are hereby AFFIRMED.

Entered: September 6, 1990
For the Court:
Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: SEP 28 1990

SUPREME COURT OF THE UNITED STATES

No. 90-6105

John H. Evans, Jr.,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 3, 1991

NO. 90-6105

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

C. MICHAEL ABBOTT
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 525-6666

75 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT AN AFFIRMATIVE ACT OF INDUCEMENT BY A PUBLIC OFFICIAL SUCH AS A DEMAND HAS TO BE SHOWN BY THE GOVERNMENT IN AN EXTORTION CASE UNDER COLOR OF OFFICIAL RIGHT?

II. WHETHER, IN THE ABSENCE OF THE HOBBS ACT CONVICTION, EVANS WAS PROPERLY CONVICTED FOR MAKING A FALSE STATEMENT ON HIS INCOME TAX RETURN?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 910 F.2d 790 (11th Cir. 1990), and is set forth in the Joint Appendix at p.32.

Citations herein are to the Joint Appendix (J.A.), the district court record on appeal (R), and video and audio tapes included in the record on appeal (T).

JURISDICTION

Petitioner's conviction for violations of 18 U.S.C. § 1951 (The Hobbs Act) and Title 26, U.S.C. 7206(1) was affirmed by the United States Court of Appeals for the Eleventh Circuit on September 6, 1990. The Petition for a Writ of Certiorari was filed on October 29, 1990, and granted by the Court on June 3, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C. § 1951 ("The Hobbs Act") and Title 26, U.S.C. § 7206(1) are the statutes involved and are reprinted in the Appendix.

STATEMENT OF THE CASE

1.

Procedural Background

This action commenced on June 16, 1988 in the Northern District of Georgia with a two count indictment against John H. Evans, Jr. alleging the defendant extorted $8,000 from an FBI undercover agent in violation of Title 18, United States Code, § 1951 and that $7,000 of that payment was not reported on his Form 1040 individual income tax return for the year 1986, in violation of Title 26, United States Code, § 7206(1).

Mr. Evans entered a plea of not guilty on June 22, 1988. He was tried before a jury with the Hon. Horace T. Ward, United States District Judge, presiding. The trial commenced on January 30, 1989. After six weeks of trial, on March 13, 1989, the jury returned a verdict of guilty on both counts. [R44-7].

On May 16, 1989, John H. Evans, Jr. was sentenced to the Custody of the Attorney General for 18 months on the extortion offense under 18 U.S.C. § 4205(b)(2). On the tax charge, Evans received an 18 months suspended sentence with 4 years probation and special conditions that Evans neither seek nor hold public office during his probation period and that he cooperate with the Internal Revenue Service in resolving his tax liability. Evans also received a $50.00 assessment on each count. [R43-107-08].

On May 26, 1989, United States Magistrate John R. Strother appointed C. Michael Abbott to represent defendant John H. Evans,

Jr. for post trial matters and for this appeal. [R3-88] On May 26, 1989, Evans filed a Motion for New Trial on the ground of newly discovered evidence and a Motion for Release Pending Appeal. On July 28, 1989, the District Court denied both motions without a hearing. [R3-90, 93, 104, 105].

On August 4, 1989, defendant Evans filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals. [R3-tab 106]. The conviction was affirmed by the Eleventh Circuit on September 6, 1990. Defendant filed a petition for certioari on October 29, 1990. The petition for certioari was granted by this Court on June 3, 1991.

Factual Background

In March of 1985, with no prior allegation of corruption against John Evans, the Federal Bureau of Investigation (FBI) began an investigation of him that was to continue for the next thirty-one months, through October of 1987. The investigation produced twenty-eight secretly taped video and audio conversations with Evans, and five contacts that were not recorded. [R25-72]. Every contact with Evans over the two and one half year investigation was initiated by the FBI.[1]

John Evans was first elected to the Board of Commissioners in Dekalb County, Georgia in 1982, the first black ever to be elected

[1] The government's position is that Evans initiated one call which triggered the July 24, 1986 meeting. The defense contends the undercover agent initiated the call. See pp.13-14, infra.

to that body. He won a second four year term in 1986. Although Evans' position on the Dekalb County Commission was considered to be half time, Evans devoted full time to his Commission duties. His annual salary as a Commissioner was approximately $16,000. [R32-49-51; R38-47,124].

The focus of the undercover investigation in this case occurred during Evans' re-election campaign of 1986. Evans contends that he accepted a campaign contribution that was unrelated to the assistance he was willing to provide and that he used the contribution given to him by the undercover agent for debts of his campaign and office. He denies that he conditioned his support of the project in question upon receiving any contribution and asserts he was entrapped by the agent, particularly with respect to his nondisclosure of $7,000 of the $8,000 he received.[2]

The undercover operation began in early 1985 when Special Agent Clifford Cormany [Cormany], an experienced agent of the Federal Bureau of Investigation (FBI) with over 19 years of Bureau service, was assigned to the Atlanta office of the FBI to assist in conducting an undercover investigation to be known as "Operation Vespine." [R22-30; R25-98]. Cormany was to investigate "allegations of public corruption in the Atlanta area, particularly in the area of rezonings of properties." [R22-31]. Using an identity of "Steve Hawkins," Cormany "represented [himself] as a land developer who had recently moved to the Atlanta area." [R22-31].

[2] See Mathews v. United States, 108 S.Ct. 883 (1988). (Defendant may deny offense or an element thereof and rely on entrapment).

Special Agent Cormany became part of a group known as WDH Developers. [R25-123]. Assisting him was Special Agent Bob Hood of the FBI posing as "Bob Howard." Eddie Wood and Clifford Hornsby were the "W" and "H" of WDH. They were being monitored by Agent Cormany. The agent was also monitoring Albert Johnson [Johnson], an associate of Wood and Hornsby and a target of the investigation. [R22-32; R25-123].

Although Agent Cormany's mission was to investigate "allegations of public corruption," he had received no allegation regarding John Evans when he agreed to accompany Johnson to a meeting with Evans on March 14, 1985. According to the agent, Johnson had set up the March 14 meeting with Commissioner Evans without the agent's knowledge. [R22-60].

Evans was well known for an open door policy and would meet with any person or group who requested his assistance. [1T-40; R30-250-51]. Johnson, his partner Cliff Hornsby and Agent Cormany met Commissioner Evans at a "Denny's" restaurant on March 14, 1985. The meeting was not taped. According to the agent, Johnson told Evans that since Johnson's retirement, he had associated himself with a group of individuals who were developing land in the Atlanta area. [R22-33]. In connection with their efforts, the group anticipated coming before governmental bodies for rezonings, etc. Johnson wanted to know if they could feel free to call on Evans for his assistance. Johnson was said to have told Evans they would make it worth his while if they did contact Evans. [R22-34]. Evans replied in general terms to Johnson that he would be willing

to assist, "if [he were] able." [R22-36].

Approximately five months later, Agent Cormany instructed Johnson to set up a second meeting with Commissioner Evans. [R22-60]. At the time of this August meeting, Johnson was still a target of the investigation. Evans had made no attempt to contact Cormany or any other member of his group between the March and August meetings. [R22-36-37].

Johnson and agent Cormany had agreed that they would use the term "leg up" to describe what they were seeking. However, from their conversations a "leg up" often appeared to mean a willingness to work harder than others, to touch all bases and to educate others about the viability of their project.

The August meeting was videotaped. Johnson began the meeting by telling Evans that he and Cormany ["Hawkins"] were forming a syndicate to buy land. [1T-5]. Johnson continued:

Johnson: One, one, uh, and I'm being quite candid. One obvious thing that we're looking for is a leg up on other developers.

Evans: Um-hmm.

Johnson: You know by, by being associated with, with those bodies that govern these things. Right? That's part of my usefulness to Steve [Hawkins]. [1T-5].

. . . .

Johnson: Uh, and quite frankly, what we were looking for and what we want with you, uh, is that leg up in Dekalb County . . .

Evans: I understand.

Johnson: . . . to help in getting zonings done, and we're not talking about something that's going to be so terrible . . .

. . . .

Johnson: But, uh, what we want to do with you and whomever in Dekalb County that you uh, that you can help work into this is to develop in Dekalb County . . . and to do it in such a way that whatever it costs, within reason, obviously, whatever it costs for expense monies we'll do. [1T-6-7].

. . . .

Cormany: And, and, I hope I'm not being too blunt, but what we want, our ability to sell this package to them is to convince them that we do have a leg up, because anybody, can, can buy land and do what the hel-, whatever they want to do with it. [1T-8].

Evans initial response is instructive:

Evans: *Well, . . . I think I understand exactly what you'll (sic) talking about. I don't have any questions. You have to, have to understand that a leg up does not begin with a G. And you know what a G means? A guarantee. A leg up does not mean that. It could never mean that.* [1T-12]. (emphasis supplied).

"Hawkins" and Johnson both responded that they understood there were no guarantees. [1T-12].

Evans went on to explain his concept of the zoning process and how it involves compromise and working with the community:

Evans: Well . . . for example . . . when this zoning that we dealt with the other day came through. There was still some . . . gray areas. So we just deferred the thing. Gave the folk the opportunity to go back and do what they should have done in the first place. When they went back, did what they were supposed to do, made one or two concessions about this, that and the other, came back, we approved it. [1T-23].

Evans also emphasized sensitivity to community needs:

Evans: They [the developers] just by-passed, tried to by-pass the community. Were . . . not sensitive to what the folks had on their minds, and so forth and so on. So when it came [before the Commission], it was gone before it got there. [1T-28].

Johnson led Evans to believe they agreed with his common sense

approach:

Johnson: Well we aren't gonna operate that way. We'll follow the form the way it should be. With some substance in it. The zoning will be . . . involved with the folk . . . in discussing it and . . . do what we know we should do. [1T-28].

Johnson also said he understood Evans' description of the zoning process and they would try to do it right the first time because they were going to run a first class operation. [1T-23]. Johnson confirmed the legitimacy of WDH noting that they were not really talking about "anything illegal," [1T-43], and would not be asking for anything unreasonable where they wouldn't have a good chance to succeed. [1T-48]. He went on to further explain their concept of a "leg up" in language similar to Evans' own view:

Johnson: *And all we're asking for is to be able to tell these people [investors] . . . we feel very very confident and we do kinda have a leg up . . . on the others. We've taken the time, taken the opportunity to, made the opportunity . . . and, taken the time to get acquainted . . . to explain the program a little bit.* [1T-56]. (emphasis supplied).

Beginning with the first videotaped meeting, Evans repeatedly encouraged Agent Cormany and Johnson to talk with Charlie Coleman, the staff zoning administrator in Dekalb County. Coleman was described as "straight as an arrow" and an experienced and solid professional in zoning matters. [R31-185; 7T-26-27]. Evans pointed out that Coleman could give them a feeling for what was feasible and it was in Coleman's office where adjustments in projects were hammered out. [1T-29]. Evans also suggested that Johnson and Cormany meet face to face, first with "two or three of the more sensitive" Commissioners, but eventually with all of them so that

Johnson and Cormany could talk independently of Evans and the other Commissioners would get to know who they were and what they were about. [1T-35,42,49]. *This was Evans' perception of a "leg up."* [R32-76; R34-58]. Agent Cormany said they were in favor of doing that. [1T-49].

Viewing the communication among Cormany-Johnson-Evans in a light most favorable to the government, Johnson and agent Cormany sent mixed messages to Evans. They would never use the word "payoff," nor openly acknowledge they had anything illegal in mind. As a result, it was never clear that Evans "caught on" to their scheme.

Evans was not contacted again until some nine months later in May of 1986. Johnson was then cooperating with the FBI. [R28-14-15, 46-47]. In May, the agent and Johnson had talked about how they wanted to get the highest density possible and were willing to do what needed to be done to get it. Whether that meant they were up to something shady or merely that they were ambitious, industrious and willing to work hard to obtain results is unclear from the context. [2T-12-13]. Evans deflected the conversation:

> Johnson: We're willing to do whatever it is we need to do . . . to get it passed.
>
> . . . .
>
> Johnson: What do we need to do?
>
> Evans: Um?
>
> Johnson: What do we need to do?
>
> Evans: Well, I don't know.

> Johnson: What do we need to offer?
>
> Evans: I don't know.
>
> Johnson: Ain't nobody here but us.
>
> Evans: No, that's all right, but I, no that. . .Um, we've kinda got a little situation where we may have to do a few things, we do 'em and I'm not sure what's all involved all the time. Same set of circumstances does not apply in every case. [2T-16,17].

There was discussion of Evans' campaign for re-election which was just getting off the ground. The primary was on August 12th, 1986. Johnson asked Evans if he needed "any expense money for coming out here this morning?" [2T-36]. Earlier in the conversation, Johnson had mentioned a campaign contribution and Evans took the remark in that context:[3]

> Evans: Well, I gotta, let me tell ya what I just got to do. I gotta order my voter registration list.
>
> Johnson: How much does that cost?
>
> Evans: I'm not sure, I got to call. Voters [sic] registration list and labels. I'm gettin ready to do a precinct mailing, again. [2T-36].

Evans estimated that between the voter registration list and mailing labels, it would cost him about $260.00. [2T-37]. Johnson asked Cormany to help Evans buy his voter registration list and Cormany gave Evans a $300 contribution. [2T-37,41]. Evans introduced into evidence his ledger book and checks from 1986 showing that he spent $284.56 for items relating to his mailing in

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[3] Earlier in the meeting Johnson had asked what size contribution Evans would consider "meaningful." Evans replied by referring to a recent breakfast held for him where guests were encouraged to contribute $1,000 apiece. [2T-27,28; See also R30-240].

May of 1986, including over $200 that very day for labels and postage. Evans properly disclosed the agent's contribution and sent a thank you note to the undercover agent. [R33-9]. He made no attempt to recontact Cormany or Johnson.

Five weeks later, on July 8, 1986, Cormany and Johnson asked Evans to meet with them for lunch at a Decatur restaurant. During the luncheon meeting, they informed Evans for the first time that they had a particular tract of land in mind and that expense monies would be available if needed. As in the two previous meetings with Johnson and Cormany, Evans again recommended that they meet with the zoning staff professional Charlie Coleman of the Planning Department for assistance. [R22-86,87; See also 1T-29; 2T-23].

There are two versions of what happened on the morning of July 23, 1986. According to the agent's testimony, he had not heard from Evans since their July 8, luncheon. The primary was now 20 days away. The agent testified that on the morning of July 23rd at approximately 9:20 a.m., he received a call from John Evans at the undercover residence he used. No recording was made of this conversation according to the agent because he was not expecting that call at his undercover residence. [R22-91].

Evans testified that around 9:00 a.m. on the morning of July 23rd, he had called the Dekalb County Commission for messages. Twenty people, including agent Cormany had left messages for Evans. Cormany's message asked Evans to call him and left the number of the agent's undercover residence. [R33-18,19]. The phone message Evans had received from Cormany was introduced into evidence. [R33-

15-36].[4]

Cormany called Evans back at 10:15 a.m. This conversation was recorded. Cormany called Evans back a third time. Cormany said he told Evans they needed to meet and suggested that Evans come to his office the following day, July 24th. [R26-163-64]. Evans testified the agent wanted to consider a contribution to his campaign and therefore prepared a list showing receipts and proposed expenditures. [R33-38-40,48-49]. The agent did not record this 11:20 a.m. conversation as he said it was "not feasible" to do so. At trial the agent was unsure of the circumstances that caused him to indicate that it was "not feasible," offering two possible explanations. [R26-160-62].

By the time of the July 24th meeting, the agent had been courting John Evans off and on for some sixteen months. Evans had told the agent and his group that he was willing to assist them "if he were able" at the very first meeting in March of 1985. [R22-36]. The reason Evans was willing to assist Cormany and to go to his office was simple according to Evans: he had been asked to help and that was his job. [R32-75,77].

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[4] In fact, the complete phone message book from 1986 covering this period which had four intact messages for every page, including the Cormany ["Hawkins"] message was introduced into evidence. The government subsequently suggested to the jury that Evans fabricated the message. [R37-33-51]. The defendant filed a post-trial motion after having the log in question and several others examined by a document examiner who conducted a relative aging analysis. The examiner concluded that the entries examined in the phone book in question (including the July 23, 1986 entry) were prepared contemporaneously, and that no evidence indicated otherwise, i.e., the entry was genuine. The government had the ink tested and found the dye lot was indeed in existence prior to the July 1986 message. [R43-96-97,100-02].

At the meeting, Cormany told Evans that his development would come within the new comprehensive land use plan, a representation that would turn out to be false. [7T-8,11]. Evans emphasized how important it was that it come within the plan stating the project needed to be as "on line" as possible so Cormany's group would not have to worry about making changes [7T-17-18]. Without requesting anything in return, Evans repeated his commitment of support early on:

> Cormany: But, ahhh. We just need to know if you can, ahh, support us on this?
>
> Evans: Well, I can support you. You just need to make sure that we know what kind of hills we've gotta climb. And that's . . . important in this racket. [7T-17].

The agent tried again:

> Cormany: Tell me if I'm, you know, if I'm being rude cause I told you I'm still a neophyte, ah, and I'm not, ah, politically oriented by any means but we have a, ah, obviously we have a budget[5] to get these things through.
>
> Evans: Sure.

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[5] Cormany mentioned his "budget" for expenses numerous times to Evans although it was often not clear that Evans understood his intentions or knew how to respond to entreaties of this kind. Witness this exchange after the July 25th meeting:

> Cormany: Well, if there's anything I need to do at all, you know I told you that . . . I gotta, I gotta a budget that's . . .
> Evans: I was just thinking, I was just thinking and I haven't thought of much.
> Cormany: Uh-huh. You know this, this budget I've got is strictly at my discretion. You know it's . . .
> Evans: Oh yeah, but I still don't, uh, haven't thought of anything that you need to do. Particularly, you understand? [14T-6; See also 20T-12,13].

> Cormany: And you know I need to know what, what it takes for your help.
>
> Evans: Well I don't know, that I can't answer . . . ahh. [7T- 23].
>
> Cormany: Any influence you need to to exert on your friends. and . . .
>
> Evans: Yeah, that part I don't, don't know right now, ah . . .
>
> Cormany: When, I mean, at what point do you think you would know?
>
> Evans: I'm tryin' to think, you know, the point I'm talking about is, ah, the rest of 'em. Ahh . . .
>
> Cormany: On the rest of the, ahhh . . .
>
> Evans: What you need to get the thing through, you know, on Bob, you know, on Brince, and probably all of'em. [7T-24].

Evans had given the same non-response to Johnson in the May meeting. Cormany gave Evans another opportunity to solicit a payoff with a question about Charlie Coleman, the staff zoning administrator:

> Evans: Why, of course, Charlie [Coleman] is probably one of the strongest links in this whole thing . . . in terms of his recommendation.
>
> Cormany: How do I need to deal with him? I mean . . .
>
> Evans: Hey, you just deal with him professionally.
>
> Cormany: Okay. [7T-26].

When Cormany subsequently made another reference to his budget, Evans took it as his cue. [7T-31]. As he sat in front of the hidden camera, Evans reviewed his list and added to his total receipts a $50 check in his pocket that he had not yet had a chance to add to his calculations of the night before, having received it

only that morning so that the estimated budget figures he gave to the agent would be as accurate as possible. He then announced from his hand-penciled $14,180 budget covering June 29 to August 12 (primary day), that he had received $6295, leaving a shortfall of $7885. [7T-31-33]. At trial, Evans introduced into evidence the original list shown to the agent as well as a bank deposit slip showing the deposit of the $50 contribution into his campaign account. [R33-40,50-51].

Cormany noted that Evans' budget only went through August 12th, the inference being that perhaps Evans could use more money after the primary. Evans made clear to the agent that he had no need for campaign money after August 12th because if he got past the primary, he would have no opposition in the general election. [7T-31]. Undaunted, the agent continued:

Cormany: Can I, can I talk frankly with you . . .

Evans: Yeah.

Cormany: And, and this is between you and I. I need, I desperately need, your help and your support on this project. You, I'm in one business, you're in another.

Evans: *Yeah, yeah, you got me.* [7T-33]. (emphasis supplied).

Evans was indicating his support was not in issue. Cormany then said that because of Evans' assistance and influence, he could cover the entire amount of the shortfall. [7T-33]. Evans immediately balked and said Cormany did not understand:

Evans: *Well, let me tell you. I, it's it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to*

handle of that. [7T-33]. (emphasis supplied).

Evans had repeatedly told Cormany over a long period of time that he would assist him. Cormany now said he wanted to contribute to a campaign two weeks away. Evans, in his awkward way, tried to tell the agent that how much Cormany gave and what Evans did to assist were not related:

Evans: Oh, I'll, let me let me make sure, and I understand both of us are groping . . . for what we need to say to each other.

Cormany: I want, I don't want, ahh . . .

Evans: Naw, I understand . . .

Cormany: I don't want to piss you off John.

Evans: No, no, no, ain't gonna be none of that.

Cormany: I'm a business man.

Evans: This is, and I understand.

Cormany: All I want . . . let me, let me kinda . . .

Using the past tense, Evans emphasized his past promises of help:

Evans: I'm gonna work. Let me tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean?

Cormany: Yeah.

Evans: *If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.* (emphasis supplied).

Cormany: I understand.

Evans: You see, what I'm doing is giving you a fair assessment of what my needs are to be re-elected on August 12th.

Cormany: Okay. [7T-34-35].

Cormany tried to rehabilitate his position:

Cormany: By the same token if I came in and said, John, I want you to do all this, help me with all this, and take all, all this heat from the people that show up at the public hearing and everything . . .

Evans: Right.

Cormany: . . . and good luck on your campaign.

Evans: Right.

Cormany: I don't think (LAUGHS) you'd be that inclined to help me.

Evans: *Well, let me tell you.* (emphasis supplied).

Cormany: [interrupts] And that's, and that's not, that's just business. [7T-40,41].

Evans answered by stating that regardless of Cormany's contribution, there were limits to how he would assist:

Evans: Well, you have to understand, too, that, ahh, regardless of what we did, I wouldn't go off the ninth floor out the window, regardless of how, how we operated. I wouldn't get on the ledge of the ninth floor and jump out.

Cormany: What, now I'm sorry, I don't, I don't . . .

Evans: Naw, I'm just saying regardless of how you help me, if if if things were crazy and wild and I'd say here's a red flag (LAUGHS). You know what I mean. I would not jump out the ninth floor window. I'd just do what I think's prudent under the circumstances. Ah, but those are far-fetched situations. [7T-41].

In summary, Evans had never indicated that Cormany was required to make any campaign contribution nor did he place any conditions on his help. He was certainly willing to accept a campaign contribution for the primary but Evans had long ago promised his support and that promise stood, regardless of the size

of any contribution Cormany wished to make. [R33-76-78]. Cormany wished to make a contribution of $8,000.00.

Evans testified that the amount of the contribution surprised him and was so great that he feared his constituents would not understand it. [R33-79-80; R34-100]. When the agent offered "cash" or "check," Evans then decided to take the bulk of it in cash, recording only a $1000 check. [7T-44; R33-79]. Cormany then asked Evans to keep the matter confidential beween the two of them and Evans agreed to do so. [7T-45].

The government contribution would be the largest contribution of Evans' campaign, eight times what Evans suggested to Al Johnson in May would be a "meaningful" contribution and by far the largest contribution Evans had ever received as a public official. [R33-76-77].[6]

Cormany contacted Evans again later on July 24th when he discovered for the first time that the property WDH was interested in developing had been rezoned within the past 24 months (in November of 1984) which meant that it was not eligible for another rezoning for two years, or until November of 1986. [R23-72,73].

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[6] The relative modesty of the Evans campaign financial picture was disclosed when the amount of contributions received by Evans and other candidates for the Dekalb County Commission came up during the course of the July 25, 1986 meeting. Evans had mentioned an error in an Atlanta Constitution article appearing the day before which listed the amount of campaign contributions candidates for the Commission had received to date. 10T-48. According to the article, Commissioner Lanier led in contributions with $136,274, most of which came from real estate developers. Evans was listed as having received about $91,000. *In fact, the correct figure for Evans was only $19,000.* The afternoon paper, the Atlanta Journal, corrected the error. R23-87,88; R33-12-14; R34-44-48.

When Evans and Cormany met on the 25th of July, much of the conversation was centered around whether or not this unforseen two year requirement could be waived. Evans indicated that a waiver of the two year requirement was routinely done as a matter of courtesy if a hardship existed, and should not be a problem. [10T-24,25; R33-81]. He suggested again that the real key was for Cormany to get with the staff zoning administrator Charlie Coleman to hammer out any problems in their proposal. [10T-16,22-23].

When the agent reintroduced the topic of their agreement made the day before and gave Evans the contribution, Evans said he appreciated "Hawkins" even talking with him about a campaign contribution. [10T-47].

Evans willingly set up luncheon meetings with two commissioners, Commissioner Manning and Commissioner Morris, so that Cormany would have an opportunity to familiarize them with his project and the waiver. As the result of the agent's explanation of why the two year rule should be waived, Commissioner Manning indicated his willingness to vote for the waiver. [R24-59]. The development project was in the district represented by Commissioner Morris. Morris indicated he would support the waiver if the zoning request would be within the comprehensive plan. Cormany said it would. [R27-31]. At the Commission meeting, the waiver was granted 4-0. Cormany had personally lobbied for 3 of the 4 votes he received. [R24-68,69].

On August 27, 1986, Cormany filed a petition for rezoning. [R24-74-75]. When the agent called Evans on August 28, 1986, he

told Evans for the first time ever that the project actually filed was not within the comprehensive land use plan and there was a "possibility" there would be an increase in density of about two units per acre.[7] [22T-3-4].

As late as October 8, 1986, the last time Evans met with the agent on this project, Evans repeated what he had said on July 24th, i.e., he wanted to make clear he could not guarantee results and did not control other Commissioners:

> Evans: Let me tell you, what you have to do is you have to . . . check with the folk and then you pray a little bit, like in all cases, that something doesn't trigger off some other reaction. And nobody ever knows that. Nobody ever knows that. I don't care what . . . it is or who it is or even if . . . Joe Frank Harris [Governor of Georgia] came up there, he couldn't be sure of nothing. *I mean I say that just to make that you're clear . . . that I don't think any of us have that kind of superior control over anybody for any reason . . . .* [26T-32]. (emphasis supplied).

Agent Cormany finally decided to end the project by withdrawing the zoning application without prejudice. He wrote a letter to each Commissioner explaining his position. [R25-64-66]. Cormany appeared before the Board of Commissioners on October 28, 1986, and the Board agreed to allow him to withdraw his petition

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[7] The application filed requested R-50 zoning. The previous RCD zoning would allow 4 1/2 units per acre but the particular plat of land being developed had a restriction of 3 units per acre voluntarily placed on it by the previous developer. [R31-55]. Hawkins' application would have allowed about 5 units per acre, up 1/2 unit from the normal zoning of 4 1/2 and up 2 units per acre from the voluntary condition placed on this particular plat by the previous developer. [R24-75; R27-83; R31-59].

without prejudice. [R25-66-68].[8]

The agent's contacts with Evans ended at that point with regard to the zoning matter. He did call Evans twice in 1987, once in April and once in May. He also had a tape recorded meeting with Evans at Evans' home in May of 1987. [R25-69-70]. None of these contacts was fruitful in terms of obtaining additional evidence against Evans and none was played for the jury.[9]

Gerald Eugene Frink, a revenue agent with the Internal Revenue Service testified that for the year 1986, the joint return of John and Ina Evans reported a gross income of $24,002.78 for a family of four and did not include the $7,000 Cormany contribution. [R28-222,226-228,238]. Frink testified that if an elected official received a payoff he would have to report that as income [R28-231] but if he received a political contribution used to pay off campaign debts, that would not be income. [R28-239].

No Commissioner or lay witness ever testified that Evans

[8] Both the Planning Department of which Charlie Coleman was a part and the Planning Commission, an advisory group, recommended against the merits of "Hawkins" project. [R24-92,94,97]. A local citizens group, the Community Council, recommended approval of the project. [R24-91]. The evidence showed that Evans' support of the project was entirely consistent with his past voting record. [See R32-19-23].

[9] On October 7, 1987, two FBI agents went unannounced to Evans' office to see if he would disclose the amount that Cormany had given to him. They did not tell him he was a target of an investigation, and they misrepresented their official purpose. [R28-137]. In response to a question asking Evans to identify persons who contributed more than $500 to his campaign, Evans identified "Hawkins," but incorrectly stated there were no additional monies not reported from anyone on the list of names shown to him. [R28-130-31]. Cormany, while posing as "Hawkins," had earlier solicited a promise from Evans that neither of them would disclose the additional amount to anyone. [7T-45,47-48].

attempted to influence them in any way on "Hawkins'" project. Charlie Coleman, Assistant Director of the Planning Department testified that he encourages developers and particularly first time developers in Dekalb to contact his department for assistance. [R31-52]. Coleman also testified that John Evans had not tried to infuence him on this or any other zoning matter. [R31-58].

Commissioner Morris and Commissioner Manning both testified that they did not consider that Evans had lobbied them on behalf of "Hawkins'" project. [R31-187,223]. Evans testified he had mentioned the waiver to Commissioner Schulman [17T-2-3] but he had never contacted Commissioners Lanier, Fletcher or Williams with regard to Cormany's project. [R33-111; R37-70-71].

Although Evans spent the money he had projected on the list he showed to Cormany, he ended up both raising more and spending more than he had anticipated. Therefore, at the end of his campaign even though he had spent almost $7,000 more than the $14,000 projected budget he showed Cormany, he still had a surplus of over $7,000, including the cash contributed by Cormany. [R33-87-89; R34-25-26]. Evans' explanation was that in a political campaign, he never knows for sure what he might need and therefore never quits trying to raise money. [R33-94].

Evans testified that since he had money left over from the campaign, he used $4100 of the $7,000 cash from "Hawkins" to repay his mother, Margaret Berry, who had loaned him $5200 for his first campaign in 1982. That $5200 loan from his mother had been duly recorded on Evans' 1982 disclosure form for his 1982 campaign.

[R33-97]. Both Evans and his mother testified that in November of 1986, he made the $4100 partial repayment to her, in cash, just as he had received it from her six years earlier. [R33-99].

In December of 1986, Evans used the rest of the $7,000, a sum of $2900, to repay himself for loans he had made to his own campaign. Over the years 1982-86, Evans had made close to 350 loans to his own campaign, each of which had been duly recorded on his books. [R33-100-01].

Because of the size of the agent's contribution and because Cormany asked him not to disclose the money, Evans said he did not record the $7,000 in cash on his books nor on the required state disclosure form. He also did not record the repayment to his mother or the repayments to himself which came from the same cash contribution. Later, Evans determined that he had to record the "Hawkins" contribution to keep his books straight. The $4100 he repaid his mother in 1986 and the $2900 he repaid himself in late 1986 and early 1987 both came before Evans knew of the undercover operation. However, a year later when Evans recorded these payments in his books in order to keep them straight and amended his state disclosure forms, he knew he was under investigation and he had counsel. [R33-96-104,106-07].

SUMMARY OF THE ARGUMENT

I. Title 18 United States Code, Section 1951 provides in relevant part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commere . . .by robbery or extortion . . .in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

There appears to be general agreement among courts and commentators that the "extortion under color of official right" clause in 18 U.S.C. § 1951(b)(2) is to be read as requiring "the obtaining of property from another, with his consent, induced ... under color of official right." The question presented for review is whether or not an affirmative act of inducement by a public official, such as a demand, has to be shown by the government in an extortion case "under color of official right."

In 1972, the seminal case of United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972), established that no proof of threat, fear, or duress was required in a case brought "under color of official right." In short succession, six other circuits followed Kenny's lead. It was not until 1984 that the Second Circuit, sitting en banc, provided an opposing view, holding that extortion

under color of official right does not occur when a public official merely accepts unsolicited benefits knowing that they were given because of his public office. In United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984) (en banc), the court held that although receipt of benefits is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits. In 1988, the Ninth Circuit, also sitting en banc, agreed with the Second Circuit's decision in O'Grady. United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc).

In 1990, the Eleventh Circuit reaffirmed its past holdings, following the majority rule, stating:

> the requirement of inducement is *automatically* satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." United States v. Evans, 910 F.2d 790, 796-97 (11th Cir. 1990) (emphasis in original).

It was the view of the court in Kenny, supra, that the under color of official right language repeats the common law definition of extortion, a crime which could only be committed by a public official, and does not require proof of threat, fear, or duress. Id. at 1229.

At common law, extortion under color of official right consisted of a public official unlawfully taking, by color of his ofice, fees that were either not due, or more than is due, or before it was due. This common law misdemeanor was of importance

"in the days when public officials received their compensation through fees collected and not by fixed salary." State v. Begyn, 167 A.2d 161, 166 (N.J.S.Ct. 1961), *cited in* Kenny, supra.

The evidence indicates that there was little or no discussion of the color of official right clause when it was first passed as a federal offense in the Anti-Racketeering Act of 1934, or in its successor, the Anti-Racketeering Act of 1946, known also as the Hobbs Act. The 1934 Act was intended to "set up severe penalites for racketeering by violence, extortion, or coercion, which affects interstate commerce."

The Hobbs Act carries a penalty of twenty years imprisonment, a far cry from the one year penalty for the common law misdemeanor. Petitioner submits that there is no evidence that Congress intended to adopt the common law definition of extortion under color of official right as defined in State v. Begyn, supra.

The definition in the 1934 Act was adapted from New York statutes which retained the distinction between bribery and extortion. In a bribery offense both the payor and payee are considered guilty parties whereas in an extortion offense, the payor was considered a "victim" and the element of duress was essential to the offense. These distinctions between bribery and extortion are maintained to this day in the federal code. *E.g.*, *compare* 18 U.S.C. § 201 *with* 18 U.S.C. § 1951.

The facts of the case under review demonstrate the blurred distinction between bribery and extortion under the federal scheme as currently interpreted by a majority of appellate courts. The

evidence against the petitioner Evans is more conducive to a charge of bribery than one of extortion, i.e., there is little evidence that Evans was conditioning his support on the receipt of a campaign contribution. Furthermore, the "payee" was clearly the aggressor over the sixteen months he pursued Evans and would normally be considered a guilty party were he not an undercover agent.

The plain meaning of "extortion," the development of the Hobbs Act as a "racketeering" statute focused on providing substantial sanctions for behavior based on force, violence and coercion and the distinction that existed at the time between bribery and extortion, in addition to the lack of evidence that Congress intended to make this clause of the Hobbs Act applicable to bribery, support petitioner's claim that an element of duress such as a demand is necessary in order to induce property under color of official right. As this Court has often stated, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. McNally v. United States, 483 U.S. 350, 359-60 (1987). Here, "[i]t would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion. McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1816 (1991).

In petitioner's case, it is also submitted that the *mens rea* required of Evans was ignored by the district court's charge which focused on the undercover agent and allowed Evans to be convicted

based on his passive acceptance of benefits if determined to be in exchange for a "request" of Evans by the agent. The Eleventh Circuit required no true *quid pro quo* as required by this Court in McCormick v. United States, __U.S.__, 111 S.Ct. 1807 (1991).

II. In Count II of the indictment, the defendant was charged with willfully making a false statement on his tax return in violation of 26 U.S.C. § 7206(1). Petitioner submits that the district court's charge on extortion in Count I contained language that suggested that the money given to Evans may not have been a campaign contribution, language which would have carried over to the charge in Count II. In addition, in the context of this case involving an undercover agent, the district Court again ignored the mens rea of Evans and did not give any assistance to the jury with respect to how to determine whether or not the money given to Evans was a campaign contibution.

Should the Court determine that petitioner was improperly convicted under the instructions given in the district court, his conviction on Count II for willfully making a false statement on a tax return should also be reversed as being derived from and inextricably linked to that offense. Alternatively, this case should be remanded to the district court to determine whether the verdict on Count II can survive in light of the instructions thereon and in the absence of the Hobbs Act conviction.

ARGUMENT AND AUTHORITY

I. THE DISTRICT COURT ERRONEOUSLY CHARGED THE JURY ON EXTORTION UNDER COLOR OF OFFICIAL RIGHT BY NOT REQUIRING INDUCEMENT, AUTHORIZING A CONVICTION BASED ON PASSIVE ACCEPTANCE OF A CONTRIBUTION "IN EXCHANGE FOR" A REQUEST BY THE PAYOR.

THE COURT'S CHARGE ALSO IGNORED THE MENS REA REQUIRED OF THE DEFENDANT, FOCUSING INSTEAD ON THE ACTIONS OF THE PAYOR, AN UNDERCOVER AGENT.

A. *Inducement*

Plainly stated, the issue presented for consideration is whether or not an affirmative act of inducement by a public official, such as a demand, has to be shown as a part of the government's case in an extortion case under color of official right. The statute, 18 U.S.C. § 1951, provides in relevant part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

There appears to be general agreement among courts and commentators that the "extortion under color of official right" clause is to be read as requiring "the obtaining of property from

another, with his consent, *induced* . . . under color of official right." The controversy centers upon the meaning of the words "induced under color of official right."

In 1972, the seminal case of United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972), established, almost without discussion, that no proof of threat, fear, or duress was required in a case brought "under color of official right." The decision in Kenny was soon followed by six other circuits.[10]

In 1984 and 1988, the Second and Ninth Circuit Courts of Appeals rendered en banc decisions providing an opposing view. In United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc), O'Grady was employed by the New York City Transit Authority as a quality control superintendent when, in 1981, he was indicted under the Hobbs Act for accepting an assortment of benefits valued at approximately $30,000 from companies under contract to provide subway cars to the Authority. Id. at 683-84. As phrased by the Court, the issue was "whether extortion under color of official right occurs when a public official merely accepts unsolicited benefits knowing that they were given because of his public office." Id. at 684. The Second Circuit held that "[a]lthough

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[10] United States v. Hathaway, 534 F.2d 386, 394 (1st Cir.), cert. denied, 429 U.S. 819, 97 S.Ct. 64; United States v. Trotta, 525 F.2d 1096, 1098-1099 (2d Cir. 1975), cert, denied, 425 U.S. 971 (1976), 96 S.Ct. 2167; United States v. Price, 507 F.2d 1349, 1350 (4th Cir. 1974); United States v. Staszcuk, 502 F.2d 875, 877-78 (7th Cir. 1974), rev'd in part on other grounds en banc, 517 F.2d 53 (1975), cert denied, 423 U.S. 837, 96 S.Ct. 65; United States v. Brown, 540 F.2d 364, 372 (8th Cir. 1976); United States v. Hall, 536 F.2d 313, 316-17, 320; (10th Cir.), cert denied, 429 U.S. 919, 97 S.Ct. 313.

receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits." Id. at 687.

In United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc), Katherine Aguon was the director of the Department of Education (DOE) in Guam. A co-defendant was a vendor to the Department and provided Aguon with approximately $8500 in home furnishings so that he would have "no trouble" with a maintenance contract with the DOE. Id. at 1160-61. The Ninth Circuit adopted the reasoning of the court in O'Grady and added:

> We hold that proof that the defendant "induced" the improper payment is an essential element in the crime of extortion and that "inducement" can be in the overt form of a "demand," or in a more subtle form such as "custom" or "expectation" such as might have been communicated by the nature of defendant's prior conduct of his office." Id. at 1166.

In 1990, the Eleventh Circuit's decision in United States v. Evans, 910 F.2d 790 (11th Cir. 1990) continued to follow the majority of circuits and joins the issue presented here in very concrete terms. As to the requirement of inducement, the three-judge panel in Evans held that in a Hobbs Act case under color of official right,

> the requirement of inducement is *automatically* satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." Id. at 796-97 (citations omitted) (emphasis in original).

The panel conceded that it "appears somewhat academic to argue

whether inducement is still required if inducement is automatically present by virture of the official's position." Id. at 796, n.5.

Petitioner submits at the outset that the cases relied upon by the third circuit in Kenny do not support the result, but are nevertheless instructive in reviewing the historical development of the law before and after that landmark decision. The rationale of Kenny, now adopted by a majority of circuits notwithstanding individual nuances, is that because the language of § 1951(b)(2) is in the disjunctive, it therefore authorizes two ways for a public official to violate the statute. First, a public official could employ "force, violence or fear," the theory used exclusively by the government prior to Kenny. United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971); United States v. Hyde, 448 F.2d 815, 833 (5th Cir. 1971); United States v. Kubacki, 237 F. Supp. 638, 641 (E.D. Pa. 1965). Alternatively, a public official could use public office "under color of official right" to commit the federal offense of extortion. United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972). Although the literal text of the statute will support that interpretation, it begs the question posed here.

The three judge panel in Kenny continued:

> The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official,[11] and which did not require proof of threat, fear, or duress. Id. at

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[11] At least one commentator apparently disagrees with the proposition that at common law, extortion under color of official right could only be committed by a public official. See Lindgren, *Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L.Rev. 815, 875 *et seq.* (1988).

1229. United States v. Nardello, 393 U.S. 286, 289, 89 S.Ct. 534; United Sates v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947); State v. Begyn, 34 N.J. 35, 167 A.2d 161 (1961); State v. Weleck, 10 N.J. 355, 371, 91 A.2d 751, 759-760 (1952).

It is not clear how the conclusion was reached in Kenny that the common law definition of extortion is what Congress intended to adopt or that the definition of common law extortion referenced in two New Jersey Supreme Court cases is related to the Hobbs Act. In light of the legislative history of this extortion statute and the distinctions existing at the time of its enactment between bribery and extortion, an unexamined assumption from Kenny is whether, in an extortionate scheme "under color of official right," Congress authorized a violation by a showing merely that the officeholder accepted an undue benefit, or whether the public official must still demonstrate an element of "duress" with respect to the "victim" -- some affirmative act of inducement of the benefit supplied -- before a conviction can be obtained.

None of the cases relied upon by the court in Kenny was a Hobbs Act case. Two state decisions are cited. In State v. Begyn, 167 A.2d 161, 34 N.J. 35 (S.Ct. 1961), the defendant was convicted of misconduct in office, not extortion. However, in discussing extortion the Court set out the common law definition:

> Our extortion statute (citation omitted) which had its origin at least as early as 1796, appears on its face to have been originally intended to be reiterative of the common law. (citations omitted). The essence of the offense was the receiving or taking by any public officer, by color of his office, of any fee or reward not allowed by law for performing his duties. The purpose would seem to be simply to penalize the officer who non-innocently insisted on a larger fee than he was entitled to or a fee where none was permitted or required

> to be paid for the performance of an obligatory function of his office. *The matter was obviously of particular importance in the days when public officials received their compensation through fees collected and not by fixed salary. Our early cases dealt with precisely that kind of a situation.* Id. at 166 (emphasis supplied).

The explanation given by the court of the context in which the statute was used at common law -- public officials acting as collection agents for fees due the governing body, part of which paid their own salary -- is noteworthy to the extent that it is unlikely that scheme was widely practiced at the time the Hobbs Act was enacted in 1946.

The second state decision cited in Kenny, State v. Weleck, 91 A.2d 751, 759 (1952) provides the following definition:

> Extortion technically is an official misdemeanor, while *in its larger sense it signifies any oppression under color of right*; in its strict sense it signifies the taking of money by any officer by color of his office where none or a part only is due. 1 Hawk, P.C., p. 418; 2 Bish. Cr.L., § 392; Rev. tit. "Crimes," p. 230, § 23, *as cited in* Kirby v. State, 57 N.J.L. 320, 321, 31 A.. 213 (Sup. Ct. 1894) (emphasis supplied).

Contrary to the opinion in Kenny, "any oppression under color of right," suggests an element of duress for this common law misdemeanor.

Of the federal decisions cited, United States v. Nardello, 393 U.S. 286, 89 S.Ct. 534 (1969) was an extortion case brought under the Travel Act, 18 U.S.C. § 1952. The question presented was whether the Travel Act, which prohibits travel in interstate commerce with intent to carry on "extortion" in violation of the laws of the state in which committed, applied to extortionate conduct classified as "blackmail" but not "extortion" in the

Pennsylvania penal code. In Pennsylvania, the statute entitled "extortion" applied only to the conduct of public officials. The Supreme Court found that the Travel Act "reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem." 393 U.S. at 292; 89 S.Ct. at 538. In language applicable here but not helpful to the decision in Kenny, the Supreme Court in Nardello declined to give "extortion" an unnaturally narrow reading in holding the Act was applicable in the Pennsylvania case:

> Appellees, according to the court below, attempted to obtain money from their victims by threats to expose alleged homosexual conduct. Although only private individuals are involved, the indictment encompasses a type of activity generally known as extortionate since money was to be obtained from the victim by virture of fear and threats of exposure. *In light of the scope of the congressional purpose we decline to give the term "extortion" an unnaturally narrow reading* (citation omitted) and thus conclude that the acts for which appellees have been indicted fall within the generic term extortion as used in the Travel Act. 393 U.S. at 295-96; 89 S.Ct. at 539. (emphasis supplied).

In United States v. Sutter, 160 F.2d 754 (7th Cir. 1947), the second federal case cited by Kenny, a War Department employee was convicted of extortion under color of office for soliciting charitable contributions from manufacturers doing business with his office and keeping the money himself. As the statute, 18 U.S.C. § 171, did not define "extortion," the court determined that the term was used in its common, ordinary sense as distinguished from the sense in which it was known at common law. The Seventh Cicuit noted that the contributions were voluntary and reversed, in language similar to that in Welek, supra, stating, "[i]t is the

oppressive use of official position that is the essence of this offense." Id. at 756. The court also offered the following dictum:

> In the common law offense of extortion, color of public office took the place of the force, threats, or pressure implied in the ordinary meaning and understanding of the word extortion. Ibid.

Professor and former Department of Justice official Charles Ruff, in his article entitled, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977) [hereinafter *Ruff*], characterizes that dictum in Sutter as being "an explanation wholly at odds with the true common law origins of the offense but later relied on by some courts to define the scope of the parallel provisions of the Hobbs Act."[12] Ruff, supra, at 1182.[13]

Judge Aldisert of the third circuit, dissenting in a post-Kenny decision, commented more fully on the dictum in Sutter:

> Against the backdrop of [the] common law history, it becomes important to understand exactly what Judge, later Justice, Minton meant in *United States v. Sutter, supra*, when, in dictum, he stated that at common law "color of public office took the place of the force, threats, or pressure implied in the ordinary meaning of the word extortion." If this statement means that no force, threat, or pressure need be proved if the officer charged an official fee when none was required by law or charged a fee larger than that provided by law, it is proper.

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[12] See Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), cert. denied, 349 U.S. 915 (1955) (common law rule that color of office takes place of force, threat, and pressure in case of public official not applicable to union official).

[13] Blackstone defined extortion as "an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries 141 (1769).

> But if, outside the context of charging an improper fee for the mandatory performance of official duty, the statement means that one need not prove force, fear or duress at common law to prove wrongdoing on the part of an official, then I agree with Professor Ruff that this is "an explanation wholly at odds with the true common law origins of the offense." (citation omitted) That a number of courts have subsequently parroted Minton's formulation (citation omitted) does not legitimate what was illegitimate when first uttered. Error is not cured by repetition. United States v. Cerilli, 603 F.2d 415, 434-35 (3rd Cir. 1979) (dissenting opinion).

Judge Aldisert's reference sets in perspective the common law misdemeanor of extortion which has little in common with the purposes or focus of the racketeering statute known as the Hobbs Act.

It appears to be generally accepted that the definition of "color of official right" as it now appears in the Hobbs Act was adapted from the New York Penal Law of 1909. See United States v. Enmons, 410 U.S. 396, 406 n.16 (1973); United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971); United States v. Mazzei, 521 F.2d 639 (3d Cir. 1975); United States v. Cerilli, supra, at 431-32 & n.23.[14] The New York law read as follows:

> Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right. Penal Law of 1909, § 850, as

[14] But see United States v. Harding, 563 F.2d 299, 304 (6th Cir. 1977):

> [W]hile it is true that the debates focused on the New York statute as a point of reference, nothing in those debates leads this Court to conclude that Congress intended to adopt New York decisional law as controlling on the federal courts, particularly since the anomalous New York definition of extortion was not articulated until 1960, some 14 years after the passage of the Hobbs Act.

> amended Laws of 1917, ch. 518, reprinted in N.Y. Penal Law, appendix, § 850 (McKinney 1967).

Under New York law, extortion under color of official right was either oppression, the unlawful and malicious arresting of an individual or seizure of his property, or extortion, a public officer's asking, receiving, or agreeing to receive a fee in excess of that allowed by statute or when no such fee is authorized. Id., §§ 854-855. Section 850 carried a penalty of up to twenty years imprisonment but the offenses "under color of official right" were both misdemeanors. Id. § 852. Judge Aldisert was of the opinion that "[u]nless money is received under a specific misrepresentation that it is an authorized fee, a public official cannot be guilty of extortion under New York law in the absence of duress." United States v. Cerilli, supra, at 433 (dissenting opinion).

Although it is reported that comments by Congressman Hobbs and others confirm that the New York statute was the source of the Hobbs Act definition of extortion, there was no discussion by Congress of the under color of official right clause nor of the distinctions under New York law between the various extortion offenses at the time the Act was passed. *Ruff*, at 1183; 91 Cong. Rec. 11,900, 11,906 (1945).

Under New York law at the time, the crimes of bribery and extortion were considered mutually exclusive crimes. "The payor [of a bribe is] equally as guilty as the payee, which could never be the case with extortion." People v. Dioguardi, 8 N.Y.2d 260, 273, 203 NYS.2d 870, 881, 168 N.E.2d 683, 692 (1960). The court in Dioguardi stated that, "the essence of bribery is the *voluntary*

giving of something of value to influence the performance of *official duty'* whereas the essence of extortion is `duress.'" Ibid. (emphasis in original). Dioguardi cited two pre-Hobbs Act cases. See Hornstein v. Paramount Pictures, 22 Misc.2d 996, 37 N.Y.S.2d 404, 412 (Sup. Ct.), aff'd 266 App. Div. 659, 41 N.Y.S.2d 210, aff'd, 292 N.Y. 468, 55 N.E.2d 740 (1942) and People v. Feld, 262 App. Div. 909, 28 N.Y.S.2d 796, 797 (1941).

Thus, bribery was a defense to a charge of extortion in New York. See United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965). Under a bribery statute, of course, both payor and payee are considered guilty parties, whereas in an extortion scheme, the payor is considered a "victim," a distinction maintained in the federal code to this day. *Compare* 18 U.S.C. § 201 (bribery) *with* 18 U.S.C. § 1951 (extortion).

Congressional intent with respect to the under color of official right clause is left uncertain because it simply was not discussed. However, we know the purpose of the Hobbs Act very clearly from its legislative history which has been summarized in a number of cases over the years. See generally, McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1818-19 (1991) (Scalia, J., concurring); United States v. Aguon, 851 F.2d 1158, 1163-66 (9th Cir. 1988) (en banc); United States v. Cerilli, 603 F.2d 415, 430-35 (3d Cir. 1979) (Aldisert, J., dissenting); United States v. Harding, 563 F.2d 299, 302-306 (6th Cir. 1977); United States v. Mazzei, 521 F.2d 639, 651-656 (3d Cir. 1975) (in banc) (Gibbons, J., dissenting), cert denied, 423 U.S. 1014, 96 S.Ct. 446 (1975).

The word "extortion" first appeared in the Anti-Racketeering Act of 1946[15], now referred to as the Hobbs Act, which amended the

[15] Act of July 3, 1946, ch. 537, 60 Stat. 420. The 1946 version of § 1951 was modified by Act of June 25, 1948, ch. 645, 62 Stat. 793 to read as it does today. The 1946 version read, in pertinent part, as follows:

Sec. 1. As used in this title-

(a) The term "commerce" means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States had jurisdiction; and the term "Territory" means any Territory or possession of the United States.

(b) The term "robbery" means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) *The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.*

Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by fine of not more than $10,000, or both.

Anti-Racketeering Act of 1934. The 1934 Act originated in the Senate as S.2248, 73d Cong., 2d Sess. (1934), reprinted in 789 Cong.Rec. 457-58 (1934). It contained no reference to the term "extortion" or the phrase "under color of official right." In the House, however, the bill was completely amended and a new bill substituted. The reasons for the amendment were described by the Supreme Court in United States v. Teamsters Local 807, 315 U.S. 521, 529, 62 S.Ct. 642, 645 (1942):

> After the bill had passed the Senate, however, representatives of the American Federation of Labor expressed fear that the bill in its then form might result in serious injury to labor, and the measure was redrafted by officials of the Department of Justice after conferences with the President of the Federation.

Thereafter, the House Report contained not only the text of the new version of S. 2248 (H.R. 6926)[16] but also reprinted a letter

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(emphasis supplied).

[16] The 1934 Act read in pertinent part:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce-

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) *Obtains the property of another, with his consent, induced by wrongful use of force of fear, or under color of official right*; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in futherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or

written by the Attorney General to the Chairman of the House Judiciary Committee. That letter makes clear that the Act was intended "to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce," particularly those racketeering activites connected with "price fixing and economic extortion by professional gangsters." See United States v. Mazzei, 521 F.2d 639, 652-53, n.16 (3d Cir.) (en banc), cert. den., 423 U.S. 1014, 96 S.Ct. 446 (1975). The Attorney General's letter makes no mention of extortion "under color of official right," even though the quoted phrase was included in the legislation.

As the re-drafted bill passed both houses, one could infer that Congress intended to include in the Act a form of official corruption that would be considered the public equivalent of the private racketeering by professional gangsters referred to by the Attorney General so that both would be prohibited if carried out by "violence, extortion, or coercion."

As passed, Section 2(b) of the 1934 Act, apparently adapted from the New York statute, read as follows:

> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right;

The phrasing in the Anti-Racketeering Act of 1946 is very close to the 1934 Act and to § 850 of the New York Penal Law:

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persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felong and shall be punished by imprisonment from one to ten years or by a fine of $10,000 or both. Act of June 18, 1934, ch. 569, § 2, 48 Stat. 979-80 (emphasis supplied).

> (c) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

There is no indication that by the time of the 1934 Act most public officials were still paid through the exaction of fees, as they were when the common law of extortion was developed. If Congress had discussed common law extortion and the New York law of extortion under color of official right when the Act was passed, one is hard pressed to imagine that Congress would think it important to set out severe penalties for what had been a common law misdemeanor and was a crime that likely had little, if any, impact on interstate commerce, was not a threat to the nation nor a part of the racketeering problem of "violence, extortion or coercion" that was the focus of the Act.

The penalties adopted by Congress in the Hobbs Act support such inferences. The Hobbs Act carries a penalty of up to twenty years imprisonment and a $10,000 fine. 18 U.S.C. § 1951.[17] The congressional statutory scheme for racketeering provides a greater penalty for extortion, including extortion under color of official right, than for many of the other racketeering offenses. The penalty for extortion is comparable to the penalties for money laundering (18 U.S.C. § 1956) and the use of interstate commerce facilities in the commission of murder-for-hire where personal injury but not death results (18 U.S.C. § 1958). See generally, 18 U.S.C. §§ 1951-1959. These are not misdemeanor offenses.

[17] Today, the fine for individuals could be as great as $250,000. 18 U.S.C. § 3571.

In United States v. O'Grady, supra, the Second Circuit suggested that the enactment of 18 U.S.C. § 201(g) in 1962 prohibiting the receipt of gratuities by federal officials is a clear indication that Congress did not believe the Hobbs Act prohibited bribery. Id. at 691.[18] Along similar lines, an examination of the existing extortion statutes demonstrates that they uniformly express extortion in commonly understood terms such as "demand" (18 U.S.C. §§ 872, 878) or "inducement" (18 U.S.C. §§ 874, 891) or "threats" (18 U.S.C. §§ 875, 876, 877, 891), rather than passive action. As previously noted, the distinction between bribery, where both payor and payee are considered guilty parties, and extortion, where the payor is considered a "victim," is still maintained to this day under the federal bribery and extortion statutes. *Compare* 18 U.S.C. § 201 *with* 18 U.S.C. § 1951.

In reviewing the opinion in Kenny, one cannot ignore the role played by former United States Attorney and later federal district judge Herbert J. Stern in the development of the under color of official right clause. In United States v. Addonizio, 451 F.2d 49, 72 (3rd Cir. 1971), cert. denied, 405 U.S. 936, 92 S.Ct. 949 (1972), a case regarding a prosecution of city officials for conspiracy and Hobbs Act violations decided only a year before Kenny, the third circuit had discussed the extortion/bribery distinction in the following language:

> [W]hile bribery was a voluntary payment made in order to exert undue influence upon the performance of an official

[18] But see United States v. O'Grady, supra, at 707-08 (dissenting opinion).

> duty, extortion involves payment in return for something *to which the payor is already legally entitled.* In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." Id. at 72 (emphasis in original).

Judge Stern was not only the prosecutor in Addonizio and Kenny but he very pointedly and ably argued for an expansive reading of the under color of official right clause through his own law review article. See Stern, *Prosecution of Local Political Corruption under the Hobbs Act: The Unnecessary Distinction between Bribery and Extortion*, 3 Seton Hall. L. Rev. 1 (1971) [hereinafter *Stern*]. Stern was upset by the decision in United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965), a case in which a public official had been acquitted of extortion because the evidence established voluntary payments more akin to bribery than to the duress associated with extortion. *Stern, at 8.* In Kubacki, the court had cited the New York case of People v. Dioguardi, supra, pointing out that at that time bribery was a defense to a charge of extortion. United States v. Kubacki, supra, at 641.

As the Kubacki case demonstrated, according to prosecutor Stern, if those disposed to seek or offer illicit payments became more sophisticated, it would become more difficult for prosecutors to establish the commission of extortion by duress. *Stern,* at 8. Stern realized that for a federal prosecutor the Hobbs Act has significant advantages over the Travel Act, 18 U.S.C. § 1952, which prohibits both bribery and extortion. The jurisdictional base of the Hobbs Act is broader and the penalty of twenty years

imprisonment more significant than provided under the Travel Act.[19] Stern, at 9-11. Professor Ruff concluded that Stern had great success in the courts in his attempts, "both to obtain the easier to prove jurisdictional element of the Hobbs Act and to avoid the difficult to prove duress element by creating a new violation under the Hobbs Act--extortion under color of official right." *Ruff,* 1176-1186; See also, United States v. Cerilli, supra, at 426 (Aldisert, J., dissenting). Beginning with the Kenny case, the federal courts by and large supported such efforts.

Both Judge Gibbons[20], the author of the opinion in Kenny, and Judge Aldisert[21] of the third circuit have spoken of their belief that the legislative history of the Hobbs Act is at odds with its present day use. Judge Noonan, speaking of Judge Stern's efforts and of the decision in Kenny, lends support to the views held by

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[19] The Travel Act provides a penalty of imprisonment of only five years. 18 U.S.C. § 1952. In Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059 (1971), the Court noted Congress would have realied that an expansive application of the Travel Act "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." Insofar as those factors are not discussed in the legislative history, that suggests that Congress "did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." Ibid.

[20] "I ask, however, whether anyone reading this 1934 statute aimed primarily at labor racketeering would have anticipated that it regulated state election compaign financing." United States v. Mazzei, 521 F.2d 639, 655 (3d Cir. 1975). (dissenting opinion).

[21] "Nothing in the legislative history shows that the 1934 Act was intended to permit federal authorities to police influence peddling in the political processes of the states." United States v. Cerilli, 603 F.2d at 431 (dissenting opinion).

Professor Ruff and Judges Gibbons and Aldisert:

> Stern's contention that Blackstone supported his interpretation was substantively inaccurate; and Congress had not treated extortion and bribery as the same. A statute banning extortion by federal officials had been on the books since 1909. It had never been interpreted to include bribery. In statutes enacted as recently as 1961 and 1970, Congress had continued to use "extortion" and "bribery" as distinct terms. As effectively as if there were federal common law crimes, the court in *Kenny* ignored Blackstone and congressional usage, for practical purposes amending the Hobbs Act and bringing into existence a new crime--local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun. John Noonan, Bribes, p. 586 (1984).

An examination of the facts of the case under review here demonstrates the blurred distinction between bribery and extortion under the federal scheme as currently interpreted by a majority of the appellate courts. The evidence at trial against John Evans is more conducive to a charge of bribery than one of extortion, i.e., there is little evidence that Commissioner Evans was conditioning his support on the receipt of a campaign contribution.[22] The "payee," an undercover agent, had courted Evans for some sixteen months attempting to gain favorable treatment and was very clearly the aggressor over that period of time, making repeated calls to

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[22] This short colloquy from the cross examination of Agent Cormany makes the point:

Q: [Evans] had never said anything but that he would help you, right?
A: In connection with the scenario we presented to him, yes sir.
Q: He never threatened to withhold his support unless you paid him money, did he?
A: No, sir.
Q: He never said he would only help if you gave him money, did he?
A: No, sir. [R26-200].

initiate meetings with Evans and offering money some thirty times. [R37-211-12]. Had Agent Cormany been a private citizen and not an undercover agent, clearly he would have been charged if bribery had been the offense rather than extortion.

As we have seen, the legislative history of the "under color of official right" clause makes clear that as early as 1934, the Department of Justice was heavily involved in the passage of the legislation which contains the "under color of official right" language, language that would be carried forward in 1946, yet "[f]or more than 30 years after enactment, there is no indication that [these statutes] were applied to the sort of conduct alleged here."[23] McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1819 (Scalia, J., concurring). Language employed by this Court almost twenty years ago but applicable here gives meaning to the phrase deja vu:

> "[i]t is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." United States v. Enmons, 410 U.S. 396, 410 (1973).

It is submitted that regardless of how one views the requirements of common law extortion,[24] in light of the legislative history it belies common sense to believe that Congress intended

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[23] Petitioner raised these issues in the district court. See R1-27,47.

[24] *Compare Stern*, at 14-17 (common law extortion requires only an unlawful "taking" of money by a public official) *with* J. Noonan, Bribes pp. 564-91 (1981) (common law extortion requires a demand by a public official).

to eliminate the element of duress or coercion when it included extortion "under color of official right" as part of the Hobbs Act, a statute "to set up severe penalties for racketeering by violence, extortion, or coercion."[25] The twenty year penalty which requires additional proof of only a slight interstate commerce connection renders the "under color of official right" clause of this racketeering statute wholly dissimilar to the common law misdemeanor and its specific context of a low-level public official performing the duties of a collection agent who exacts a greater fee than may be due.

B. *The Jury Charge in United States v. Evans*

In this case, the district court's charge to the jury on the Hobbs Act,[26] provided, in relevant part, as follows:

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[25] See United States v. Mazzei, supra, at 652-53, n.16.

[26] The charge of the district court read, in pertinent part, as follows:

> The defendant can be found guilty of [Title 18, § 1951] only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, inter- rupted or adversely affected interstate commerce.
>
> Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.
>
> Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.[27]
>
> The Eleventh Circuit, speaking of the charge, stated:
>
> We agree with Evans's observation that the charge permitted the jury to convict Evans without finding that he conditioned the performance of an official act upon payment of money. Under the law of this circuit, however, passive acceptance of a benefit by a public

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> other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.
>
> So, if a public official agrees to take or withhold official action or (sic) the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.
>
> * * *
>
> The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. [R-41-136-141].

[27] The defense excepted to the Court's charge arguing that it was inconsistent with the holding of United States v. Dozier, 672 F.2d 531 (5th Cir. 1982); that it improperly focused on the motives of the contributor instead of on the intent of the public official, and that the language was not sufficiently clear. [R41-152-53].

> official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit. United States v. Evans, 910 F.2d 790, 796 (emphasis in original).

Certainly, the statutory language of the Hobbs Act on its face cannot justify the proposition put forth by the Eleventh Circuit that the power of public office *automatically supplies* the inducement in a Hobbs Act conviction. The better reasoning is that of the Second Circuit which states that "[t]he fact of public office supplies the potential threat or force necessary, but it is the wrongful use of that office to induce benefits that constitutes the crime." United States v. O'Grady, supra, at 688.[28] The court in O'Grady stated that the mere receipt of a benefit by a public official was insufficient since such an interpretation of the Hobbs Act "would place every public official in jeopardy by virtue of his status rather than his venal acts. Id. at 693. (citation omitted). Certainly, the same would be true in the eleventh circuit where inducement is *never* in issue.

The petitioner submits that a proper interpretation of the Hobbs Act requires that element of "duress" which has traditionally characterized the law of extortion, similar to the fifth circuit's statement in United States v. Dozier, 672 F.2d 531, 537 (5th Cir. 1982), *cited in* McCormick v. United States, supra at 1816:

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[28] Compare the dissenting opinion of Judge Gibbons distinguishing between the potential power of the office and the potentially separate power of the officeholder. United States v. Mazzei, supra, at 650-51.

> [A] public official may not *demand* payment as inducement for the promise to perform (or not to perform) an official act. (emphasis supplied).

The plain meaning of "extortion" as commonly understood[29], the development of the Hobbs Act as a "racketeering" statute specifically focused on providing substantial sanctions for extortion and its incorporation of the law of New York where the essence of extortion was "duress" and the distinctions between bribery and extortion had been maintained, as well as the lack of evidence that Congress intended to make this clause of the Hobbs Act applicable to bribery as well as extortion, all support Petitioner's claim that an element of "duress" is required in "extortion under color of official right." As this Court has often stated, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. McNally v. United States, 483 U.S. 350, 359-60, 107 S.Ct. 2875, 2881 (1987). Here, "[i]t would require statutory language more explicit than the Hobbs Act contains to justify a contrary

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[29] See United States v. Sutter, supra, where, relying on a dictionary definition of extortion, the court held a federal employee commits extortion when he "uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily." Id. at 756. Extortion is ordinarily understood to mean the act of obtaining money by consent, where the consent is induced by a threat of some kind of injury in the future. 2 W. LaFave & Scott, *Substantive Criminal Law*, § 8.12 (1986).

conclusion. McCormick v. United States, supra at 1816.[30]

C. *Mens Rea and Quid Pro Quo*

In Evans as in Aguon, "one searches the instructions on extortion almost in vain for any instructions enlightening the jury on *mens rea*." United States v. Aguon, supra, at 1168. By juxtaposing the minimal requirement of a passive acceptance by Evans and an affirmative "specific request" required of the undercover agent, the district court's instruction places the focus on the actions of the agent rather than the intent of the public official. Again, the fifth circuit in United States v. Dozier, supra, correctly stated the point:

> The emphasis is on the defendant's own motives rather than on his perception of a potential contributor's motive. The issue is whether Dozier "knowingly and willingly" induced some of his constituents to pay him money by threatening to take or withhold official action, not whether he accepted money as contributions with "knowledge" of a donor's corrupt intent. Id. at 542.

What the fifth circuit in Dozier characterized as *not* in issue, i.e., "whether [Evans] accepted money as contributions with 'knowledge' of the [undercover agent's] corrupt intent," is in essence what the district court charged and the Eleventh Circuit

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[30] Compare, United States v. Enmons, supra, at 411:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal government in the business of policing the ordlerly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. (citations omitted).

held was the correct interpretation of the Hobbs Act in Evans:

> In order to secure a conviction under the Hobbs Act, the government must demonstrate, among other things, that the public official knew that the payment he received was motivated by a hope of influence. United States v. Evans, supra at 798.

The position of the Eleventh Circuit which finds inducement in every benefit by virture of public office and requires a public official to be aware of the motivations of donors must be considered troublesome on its face. Every campaign contribution and every benefit received by every public official in the Eleventh Circuit has, without other showing, satisfied the inducement requirement of the Hobbs Act while public officials remain the captives of the intent of their donors. This language of the fifth circuit in United States v. Dozier, supra, seems more in line with present day reality:

> As a sister court has observed, "No politican who knows the identity and business interests of his campaign contributors is ever competely devoid of knowledge as to the inspiration behind the donation." United States v. Brewster, 506 F.2d 62, 81 (D.C. Cir. 1974). Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectations of future benefits. We must, nevertheless, discover and penalize those who, under the guise of requesting "donations," demand money in return for some act of official grace. Id. at 537.

In McCormick v. United States, supra, this Court said, "[t]he receipt of . . . contributions is . . . vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Id. at 1816. Mere knowledge of the donor's intent cannot be

sufficient.

Petitioner also submits the Eleventh Circuit in United States v. Evans, supra, did not require a true *quid pro quo*. In McCormick v. United States, supra, the government conceded and this Court held that if payments to the public official were campaign contributions, proof of a *quid pro quo* is essential. Id. at 1817. The Eleventh Circuit's charge to the jury in Evans does not meet this requirement.

The district court's charge to the jury authorized a conviction based on a passive acceptance of money in exchange for a specific requested exercise of official power *even though the payment is in the form of a campaign contribution*. There is a substantial difference between a "specific requested exercise of official power" as approved by the Eleventh Circuit in Evans and a "specific exercise of official power."

If a public official accepts a contribution "in exchange for" a specific request of him, the defendant submits that there is no quid pro quo *until and unless he complies or attempts to comply with the request since no action at all has been required of the defendant*. In Evans, the defendant could passively accept money and without more be convicted of Hobbs Act extortion based upon the undercover agent's "request," timed to take place simultaneously with Evans' acceptance of the contribution, regardless of whether Evans had formed an intent to comply or took any steps to comply. The case for the government becomes even easier if the "request" is to forbear from action.

Irrespective of Evans' intent, by becoming a public official he has "induced" the contribution and by passively accepting money given in exchange for a "request" of him he has engaged in what passes for a *quid pro quo* in the Eleventh Circuit. A statement from United States v. O'Grady, supra is equally applicable here:

> "In this case, the jury instruction was erroneous because in effect it mandated an inference of inducement merely upon a finding of acceptance of benefits with knowledge of the donor's motivation." Id. at 694 (concurring opinion).

Here, that inference was allowed because the jury was not required to distinguish between the intent of the undercover agent, which was never in doubt, and the intent of the defendant.

The second circuit in Aguon stated that "criminal intent must be submitted to the jury in a case charging extortion under the Hobbs Act" and failure to do so was plain error. United States v. Aguon, supra, at 1168. *A fortiori*, the objection made at trial here should have been sustained by the district court.[31]

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[31] See note 18, supra.

II. SHOULD THIS COURT DETERMINE THAT PETITIONER EVANS WAS IMPROPERLY CONVICTED UNDER THE INSTRUCTIONS GIVEN IN THE DISTRICT COURT ON EXTORTION UNDER COLOR OF OFFICIAL RIGHT, THE CONVICTION ON COUNT II FOR WILLFULLY MAKING A FALSE STATEMENT ON A TAX RETURN SHOULD ALSO BE REVERSED AS BEING DERIVED FROM AND INEXTRICABLY LINKED TO COUNT I. ALTERNATIVELY, THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT TO DETERMINE WHETHER THE VERDICT ON COUNT II CAN SURVIVE IN LIGHT OF THE INSTRUCTIONS THEREON AND IN THE ABSENCE OF THE HOBBS ACT CONVICTION.

In the district court the jury was instructed on Count I:

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made *in the form of* a campaign contribution. R41-141. (emphasis supplied).

A proper inquiry is why the district court's language was not, "regardless of whether the payment *is* a campaign contribution," rather than "regardless of whether the payment is made in the form of a campaign contribution." There is an inference in the district court's use of the phrase "in the form of a campaign contribution" that suggests that the money given to Evans may have been disguised as a campaign contribution but, in reality, may be an extortionate payment.

The district court did not make such a distinction in its charge on Count II, emphasizing the different treatment given to "campaign contribution" in Count I. On Count II, charging Evans with willfully making a false statement on his tax return, the jury was charged as follows:

> I instruct you further that if you find that the money the defendant received from Cormany *was* a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to

> report it as income on his federal income tax return. R41-144. (emphasis supplied).

Although the Court gave a definition on what a campaign contribution "can involve,"[32] it did not say what it "cannot involve" or otherwise explain the inference left with the jury as the result of the instruction in Count I.

In addition, as in Count I, one searches in vain for any instruction enlightening the jury on the intent required of Evans, in particular, or the parties, in general. In McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1815 (1991), this Court said:

> We agree with the Court of Appeals that in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry.

No such assistance was given to the jury in Evans, yet because an undercover agent was the payor, it was vital that some instruction be given as to whether or not an undercover agent could give a legitimate campaign contribution. In whose eyes was the jury to look to determine whether or not it was a campaign contribution? Was it a question of whether Cormany intended the money to be a campaign contribution or was it the intention of Evans that counted?[33] Certainly, there could be no question where the undercover agent stood on this issue.

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[32] A campaign contribution can involve a gift, loan, forgivenessof debt, advance or deposit of money or the conveyance or transfer oof anything of value for the purpose of influencing the nomination or the election of any person for office. R41-141.

[33] An objection was made in the district court that the instruction did not adequately establish who had the burden to prove that it was a campaign contribution. R42-10-11.

The charge was already heavily focused on Cormany, the undercover agent, since if Cormany made a specific request "in exchange for" Evans acceptance of money, there was, *ipso facto*, a violation of the Hobbs Act, regardless of whether the payment was "in the form of" a campaign contribution.

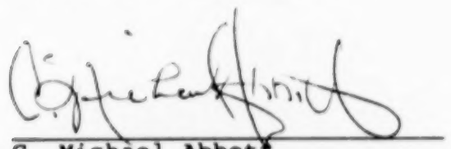
The charge in Count I erroneously suggested to the jury that if they found Evans guilty of extortion, the money he had received from the undercover agent was not a campaign contribution. Furthermore, since the offense in Count II was derived from and inextricably linked to Count I, Count II should also be vacated should the Court vacate the conviction in Count I.

This issue was not directly raised in the Court of Appeals and was presented in the petition for certioari as a "subsidiary question fairly included" in Issue I. *Sup.Ct.R.* 14.1.(a). Alternatively, therefore, it is suggested that the issue on Count II be remanded to the district court to determine whether the verdict on Count II can survive in light of the instructions thereon and in the absence of the Hobbs Act conviction.

CONCLUSION

For the foregoing reasons and based upon the authorities cited, this Court should reverse the defendant's conviction in the United States District Court for the Northern District of Georgia.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Petitioner upon:

Kenneth W. Starr
Solicitor General
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by placing a copy of the aforesaid brief in the United States Postal Service with adequate postage affixed thereon to ensure delivery.

This 5th day of August, 1991.

C. MICHAEL ABBOTT

APPENDIX

STATUTES INVOLVED

18 U.S.C. § 1951 ("The Hobbs Act")

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000, or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1)

§ 7206. Fraud and false statements

Any person who --

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

No. 90-6105

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN H. EVANS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. 1951, for agreeing, in exchange for a payment, to assist a developer in getting certain property rezoned.

2. Whether petitioner was properly convicted of tax fraud under 26 U.S.C. 7206(1) for failing to report a $7000 cash payment on his income tax return.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 32-64) is reported at 910 F.2d 790.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1990. The petition for a writ of certiorari was filed on October 29, 1990, and was granted on June 3, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of

any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

2. The Internal Revenue Code, 26 U.S.C. 7206, provides in pertinent part as follows:

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 * * * or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of attempted extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C.

1951; and of filing a false personal income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to 18 months' imprisonment on the Hobbs Act charge and a four-year term of probation on the tax fraud count. The court of appeals affirmed. J.A. 32-53.

1. The Undercover Agent Is Introduced to Petitioner

In 1984, Clifford Cormany, Jr., an undercover FBI agent, began investigating allegations of public corruption in the Atlanta area. He posed as "Steve Hawkins," a representative of a group of real estate investors interested in developing land in DeKalb County, near Atlanta. One of the subjects of the investigation was Albert Johnson, a former Fulton County official. In March 1985, Johnson, acting on his own initiative, arranged for Agent Cormany to meet petitioner, who was an elected member of the DeKalb County Board of Commissioners. 5 Tr. 59-60; 8 Tr. 125. At their initial meeting at a DeKalb County restaurant, Agent Cormany told petitioner that his investment group was attempting to develop land in the Atlanta area and they anticipated that from time to time they would have to come before governmental bodies for the purpose of rezonings, variances, and the like. He asked petitioner whether, if his investment group located land in DeKalb County, they could feel free to call on petitioner for assistance. Johnson added that in the event they did call on petitioner, Cormany's group "would see to it that it would be worth his while." 5 Tr. 36. Petitioner said that he would be willing to help and would assist them if he could. *Ibid.*; see J.A. 32-33.

In August 1985, Johnson invited petitioner to a meeting at Cormany's undercover office in Atlanta. Petitioner attended the meeting, which was videotaped. At the meeting, Cormany told petitioner that

he wanted to give his investment group a "leg up" on other developers in DeKalb County by cultivating a close association with the public bodies that dealt with zoning and related matters. Petitioner agreed to arrange for Cormany and Johnson to meet with other commissioners. J.A. 33. When Johnson suggested the possibility of payoffs for petitioner's help, petitioner assured them that, if he took their money, he would work for it (GX 1T, at 20-21):

Johnson:

> Well we, obviously, are speaking to, ah, also John, of uh, of substantial fees. Okay?

Petitioner:

> Oh, I understand. I understand.

Johnson:

> The, the, uh . . .

Petitioner:

> Yeah, but I think the thing's important. See some folks will use the fact they'll just simply make it easy and say, "Well now, I can't convince anybody to do anything." You know, I know when you try. You know, some folk come out and say, "well, you know, I've talked to everybody, and this thing won't fly." Shit, that's easy to do.

Johnson:

> Um-hum. Uh-huh.

Petitioner:

> I mean, you don't have to do nothing to come back and make that statement. 'Cause ain't nobody gonna talk to you about it, no way.

Johnson:

> That's right. (Chuckles).

Petitioner:

> You follow what I'm saying. So that's easy to do. I mean that's that, easier than getting up in the morning. I mean, I would be, if, if I was gonna say that I'm gonna help, that means I'm gonna talk to the folk and do what we have to do . . .

Johnson:

> That's what we're looking for.

2. The Undercover Agent Seeks Petitioner's Help

In May 1986, Agent Cormany and Johnson contacted petitioner and told him they were interested in a plot of land in DeKalb County and wanted to have it zoned for high density residential use. Johnson said that they "[w]ere willing to do whatever it is we need to do to * * * get it passed." GX 2T, at 16. Referring to the seven-person Board of Commissioners, petitioner responded that "we'll just have to try to parley four votes." *Id.* at 17. Johnson then asked if petitioner could "put a coalition together," whereupon petitioner mentioned that he was up for re-election that year. *Id.* at 24. When Johnson asked what size contribution to petitioner's reelection campaign would be considered "meaningful," petitioner replied that at a recent fundraising event contributors were encouraged to give $1000 apiece. *Id.* at 27.

Near the end of their discussion, Johnson asked whether petitioner needed any "expense money" for coming to the meeting that morning. GX 2T, at 35-36. Petitioner replied that he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that the registration list would cost him about $260. Cormany then wrote out a check to petitioner for $300. Petitioner used

that money to buy the list and sent a thank you note to Cormany. J.A. 34.

Two months later, Agent Cormany and Johnson met with petitioner again at a restaurant and told him that they had obtained a 25-acre tract of land that they wanted to have rezoned for high density development. They told petitioner that inasmuch as they were going forward with a rezoning application, "expense monies would be available in the event they were needed for any purpose." 5 Tr. 87.

3. Petitioner Solicits a Payment From the Undercover Agent and Promises to Assist in the Rezoning Effort

On July 23, 1986, petitioner called Cormany at his undercover residence and asked how Cormany was doing with his rezoning application. When Cormany said he was concerned that he may have filed too close to the deadline, petitioner offered to check on the matter. Cormany then asked if there was any other reason petitioner had called, whereupon petitioner raised the subject of his campaign for re-election to the County Commission. Petitioner said, "I have been running hard and pulling teeth." Cormany responded by saying that he understood what petitioner was saying, but that he was under pressure from his own investors. Petitioner assured Cormany that he was going to do all he could to assist Cormany in his rezoning effort. 5 Tr. 88-91. Cormany and petitioner arranged to meet the following day. J.A. 34-35.

On July 24, petitioner drove to the undercover office in Atlanta to meet with Agent Cormany. In the course of their discussion, which was videotaped, Cormany described his efforts in connection with the rezoning application. He told petitioner that "I'm still a neophyte, ah, and I'm not, ah, politically oriented

by any means but we have a, ah, obviously we have a budget to get these things through." GX 7T, at 23. Cormany subsequently said, "you're ah, absolutely, my, ah, spearhead in this thing," and he added again that "we got, ah, obviously, a generous budget for anything we do." *Id.* at 29-30. At that point, petitioner took out a document that he had brought with him, which contained his campaign budget from June 29 through the date of the primary election on August 12. The document showed $14,180 in expenses and $6,295 in contributions, resulting in a shortfall of $7,885. After Cormany said, "I desperately need[] your help and support on this project," petitioner said (J.A. 35-36):

> Well, let me tell you. I, it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that.

When Cormany responded, "You're talking about seven eight eighty-five," petitioner responded affirmatively. Cormany then said, "what I'm asking you John, I mean, is if I pick up the entire amount, I mean, does that, would that * * * be a reasonable relationship, a reasonable. . . ." J.A. 36. Petitioner then interrupted and said (J.A. 36-37):

> I understand both of us are groping * * * for what we need to say to each other. * * * I'm gonna work. Let me[] tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean. * * * If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you.

> I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.

Petitioner then promised to "[g]ive it the best effort." J.A. 41-42. When Cormany asked whether he could be sure that "at least you'll vote for me," petitioner responded, "You got that. * * * You got that." J.A. 43.

The two men then turned to arranging the mechanics of the payment Cormany was prepared to make. Cormany asked whether his contribution should be in cash or by check. Petitioner first responded that the payment should be in cash, "so there won't be any, any, tinges, or anything." J.A. 37. He then modified that request by asking that $1000 of the total be paid by check. He explained that he would record and report the $1000 and "the rest would be in cash." J.A. 38.

Cormany then repeated the terms of the arrangement explicitly, as he understood them, GX T7, at 49-50:

> Cormany:
>
> Look, I understand this * * * this arrangement that we have is, is, is primarily for your, your vote and your support.
>
> Petitioner:
>
> Uh-huh. Uh-huh.
>
> Cormany:
>
> . . . in helping me get this thing through.
>
> Petitioner:
>
> Yeah, the only . . .
>
> Cormany:
>
> And I understand that, that, ah, you can't guarantee . . .

> Petitioner:
>
> Right.
>
> Cormany:
>
> . . . three or four other votes.
>
> Petitioner:
>
> Well, I, I, I was . . .
>
> Cormany:
>
> As long as I just know that you'll just do what you can and to help me get it through.
>
> Petitioner:
>
> Right. That's right.

Finally, Cormany added, "I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way." Petitioner responded, "I understand. Oh, I understand that." J.A. 38.

4. Petitioner Receives $8000 and Begins to Work on the Rezoning Project

Following the July 24 meeting, Agent Cormany tried to file an application to rezone the property, but the application was rejected because the property had been rezoned less than two years earlier and zoning regulations prohibited any rezoning within that two-year period. Petitioner traveled to Cormany's undercover office again on July 25, where they discussed whether the two-year limitation could be waived. Cormany expressed his desire to have the property zoned for as high a density as possible and said that "through my association with you and, and the help you can give us * * * maybe we'll have a leg up over * * * over an average developer." Petitioner responded, "That's right." GX 10T, at 14; see *id.* at 28-29. He later repeated, "you have a leg up now, no question about that." *Id.* at 31.

Cormany then asked if any "financial consideration" would be necessary for others in connection with the vote on the waiver of the two-year rule. Petitioner replied that he would let Cormany know. GX 10T, at 20, 24. Petitioner then added that the key was one of the other commissioners. He explained, "you see once I get him postured properly then of course we can deal with the other people we need to deal with." *Ibid.* When Cormany said that he had convinced his investors that he had "a leg up over the competition," petitioner replied, "Sure, and I think you're right on that. We just have to * * * keep it on track. That means we have to keep everyone involved all the way down the line." *Id.* at 22. While they were sitting together, petitioner telephoned the Assistant Director of the DeKalb County Planning Department to discuss the two-year rule, and he promised to call several other key figures in the decisionmaking process to persuade them to support Cormany's application. *Id.* at 35-37, 58-59, 76-77.

During the July 25 meeting, Cormany gave petitioner $7000 in cash, which petitioner placed in an envelope, and a check for $1000 payable to "John Evans Campaign." Petitioner locked the cash in a file cabinet in his campaign office. Petitioner did not at that time record the $7000 cash on his books or on the required state campaign financing disclosure form. J.A. 38-39.

Three days later, petitioner spoke with Cormany and promised to give Cormany a "head count" regarding the number of votes he had lined up in support of Cormany's application. GX 13T, at 4. Later that afternoon, petitioner called Cormany; when Cormany returned the call, petitioner told him he had lined

up three of the four votes that would be needed at the August 12, 1986, commissioners' meeting to grant a waiver of the two-year rule. 7 Tr. 57. Several days later, petitioner reported to Agent Cormany that "I think we got the other one now." GX 14T, at 4. Petitioner then arranged restaurant meetings between Agent Cormany and two of the other commissioners at which Agent Cormany argued his case for a waiver. 7 Tr. 57-62. Explaining the purpose of the meetings, petitioner told Cormany, "we're just making sure we got our folk nailed in." GX 15T, at 8. Two days before the meeting, petitioner spoke with Cormany again and relayed that he had a firm commitment from a fourth commissioner to vote in favor of the waiver application. GX 17T, at 1-2.

5. The Rezoning Effort Clears One Hurdle But Encounters Another

At the August 12 DeKalb County Commissioners' meeting, the waiver was granted, with the minimum necessary number of four commissioners voting in favor of the waiver. J.A. 38-39; 7 Tr. 66. Agent Cormany subsequently learned, however, that approval of the zoning application would require an amendment to the County's comprehensive land use plan. When Cormany told petitioner that news, petitioner offered to assist Cormany in obtaining the necessary amendment. GX 20T, at 8; GX 22T, at 6. Cormany asked whether he should "set some money aside" to help get the zoning application approved. Petitioner said that he did not know whether that would be necessary, but that Cormany should "set up a contingency * * * for anything that may come up." *Id.* at 6-7. "If, if things get tight," petitioner added, "we'll just have to deal with it." *Id.* at 8.

6. Petitioner Continues His Efforts in Support of the Rezoning Application, But the Application Is Withdrawn

The Planning Department recommended denial of the application to amend the comprehensive plan, and the Planning Commission denied the rezoning request. Cormany subsequently met with petitioner, who said that he would start working immediately to "garner up four votes" on the County Commission to overturn the Planning Commission's decision. GX 26T, at 12. Petitioner said he would arrange for Cormany to get "keyed into each one of [the Commissioners], and go talk with them. And then I'll do what I got to do." *Id.* at 14; see also *id.* at 27. He added, "we just need to go on and work on the four votes. We got to do that." *Id.* at 18.

Before the County Commissioners' meeting, Cormany withdrew his rezoning application. J.A. 39; 7 Tr. 95-97. When Cormany complained to petitioner that he had not heard back from him after their last conversation, petitioner said, "I never at one time indicated that I would do anything with any other group other than the group that I sit with," GX 28T, at 3, but he added that he had already obtained three votes in support of Cormany's application and was working on the fourth, *id.* at 5.

7. Petitioner Fails to Report the $7000 Cash Payment as a Campaign Contribution and Denies Having Received the Payment

At the end of petitioner's 1986 campaign, he had a surplus of more than $7000, counting the $7000 in cash he received from Agent Cormany. Petitioner testified at trial that during 1986 he used $4100 of the $7000 to repay in cash a portion of an old campaign debt to his mother, and used the remaining

$2900 to repay himself for loans he made to his campaigns from 1982 through 1986. However, he did not record those "repayments" in his books or amend his state disclosure forms until after he knew he was under investigation. On his 1986 income tax return, also filed before he knew he was under investigation, he did not report the $7000 cash payment as personal income. J.A. 39-40.

In October 1987, two FBI agents interviewed petitioner at his office. Petitioner was informed that the agents wished to ask him about campaign contributions he had received from developers. Petitioner told the agents that Cormany had given him $1000 and that all of the contributions he received from individuals were reflected in his campaign disclosure reports. Petitioner did not mention the $7000 in cash that he received from Agent Cormany. J.A. 39.

8. Petitioner Is Convicted of Extortion and Tax Fraud

Petitioner was indicted on one count of attempted extortion in violation of the Hobbs Act by wrongfully obtaining under color of official right both the $1000 campaign contribution check and the $7000 cash payment. He also was indicted on one count of filing a false 1986 income tax return by not reporting the $7000 cash payment as personal income.

In its instructions to the jury, the district court described the elements of extortion under color of official right as follows, J.A. 13:

> [T]he defendant can be found guilty of [a Hobbs Act] offense only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; Second, that the defendant did so

knowingly and willfully by means of extortion as hereinafter defined; Third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.

Extortion under color o[f] official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.

So, if a public official agrees to take or withhold official action [f]or the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.

The district court also instructed the jury on petitioner's theories of defense, including his claims that "he accepted the money as a campaign contribution," J.A. 10; "his activities were all legitimate activities for a commissioner," J.A. 11; "he never threatened to withhold his support if he did not receive a campaign contribution," J.A. 12; "he would have rendered the same assistance * * * regardless of the size of any campaign contribution or whether he received any campaign contribution at all," *ibid.*; and "he was the victim of entrapment," J.A. 20. With respect to petitioner's campaign-contribution defense, the jury was instructed that it did not violate the Hobbs Act for an elected public official to accept a campaign contribution unless the contribution was induced as a *quid pro quo* for an official act, J.A. 16-17:

> The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office * * *. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

The tax fraud count alleged that petitioner knowingly and willfully made a false statement on his income tax return for 1986 by not reporting the $7000 cash payment he received from Agent Cormany. The jury was instructed on petitioner's theory of defense to that charge as follows: "John Evans contends that the $7000 was accepted by him as a campaign contribution, and that he was not required to report it on his income tax return. He contends further that the entire amount was used to repay a campaign debt to his mother and to partially repay his own loans to his campaign and district office." J.A. 12. The district court then instructed the jury, J.A. 19, that

> if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return.

When the court entertained objections to the jury charge, petitioner focused on the instruction that pro-

vided that "[i]f a public official demands or accepts money in exchange for specific requested exercises of his official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." J.A. 26. Petitioner objected to the language "in exchange for specific requested exercises of his official power," explaining that, in his view, "it improperly focuses on the motives of the contributor instead of the intent of the public official." *Ibid.* Petitioner contended that the instruction would have been clearer "if it were stated that the money was accepted with an agreement to perform official action as to—in place of the language 'Requested exercises of official power.'" *Ibid.* Petitioner made no other relevant objections to the jury charge. The district court declined to modify the charge.

The jury convicted petitioner on both the Hobbs Act count and the tax fraud count.

9. Petitioner's Convictions Are Affirmed

The court of appeals affirmed. J.A. 32-64. With respect to the Hobbs Act conviction, the court rejected petitioner's argument that the jury should have been instructed that it had to find that petitioner had initiated the transaction that induced Cormany to part with the money. The court instead held that the "inducement" requirement of the Hobbs Act is satisfied if "a public official has accepted money in return for a requested exercise of official power." J.A. 44. In that circumstance, the court said, "no additional inducement need be shown." *Ibid.*

The court of appeals also rejected petitioner's argument that the instructions failed to require the jury to focus on his state of mind. The court emphasized

that the district court had instructed the jury "that the public official must agree to take official action 'for the *wrongful purpose* of inducing a victim to part with property,'" and "that the defendant induced the person * * * to part with property * * * knowingly and willfully by means of extortion." J.A. 47-48.

Petitioner raised no relevant challenge to his tax fraud conviction in the court of appeals. See Pet. i n.1.

SUMMARY OF ARGUMENT

I. Most courts of appeals, including the court below, have held that the Hobbs Act prohibition against extortion "under color of official right" tracks the common law crime of official extortion and requires only that the public official accept an unauthorized payment, knowing that the payment was made in return for his official acts. Two courts of appeals have adopted a narrower construction of the offense, imposing a requirement that the public official induce the payment in some manner. We believe that the majority position is correct, and that nothing in the language, legislative history, or common law background of the Hobbs Act supports the imposition of an "inducement" requirement as an element of extortion under color of official right. In any event, however, the jury instructions in this case were consistent with the narrower construction of the statute. Therefore, regardless of whether the Court agrees with the construction of the statute adopted by the court of appeals, or whether it agrees with the narrower, minority position, petitioner's conviction must be upheld.

Consistent with the minority position, the jury was instructed that, in order to convict petitioner of extortion under color of official right, it had to find

that he induced the $8000 payment. Although petitioner claims that no inducement instruction was given, the district court told the jury that one of the elements of the offense is "that the defendant induced the person described in the indictment to part with property or money." J.A. 13. The jury was further told that a public official may induce a payment by agreeing to exchange an exercise of official power for a payment: "if a public official agrees to take or withhold official action [f]or the wrongful purpose of inducing a victim to part with property, such action would constitute extortion." *Ibid.* Thus, contrary to petitioner's assertions, the court's instructions did not allow the jury to convict petitioner of extortion on the basis of merely passive acceptance of a payment.

Petitioner argues that the instructions were unclear as to whether the jury was to focus on petitioner's state of mind or Agent Cormany's. Yet even the instruction on which petitioner bases his challenge clearly focused on petitioner's state of mind: it provided that "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power," the official has committed extortion under color of official right. J.A. 17. And the instructions as a whole directed the jury to focus on petitioner's state of mind, since the district court advised the jury that what mattered was whether petitioner wrongfully agreed to exchange his official acts for payment.

The evidence supports the jury's verdict. After petitioner was told that "substantial fees" would be available in return for his assistance, he agreed to "talk to the folk and do what we have to do." GX 1T, at 20-21. During his campaign, he presented his projected $7885 deficit to Agent Cormany, told him

that this is "how I operate," and said that "you can decide whatever part you want to handle." J.A. 36. When Agent Cormany proposed an $8000 payment, petitioner noted that "both of us are groping * * * for what to say to each other" and took the lead in deciding how the payment should be structured. Petitioner made it clear that the $7000 cash portion of the payment would not be listed on any records "so there won't be any, any, tinges, or anything." *Ibid.* Thus, the evidence showed that petitioner corruptly induced the payment.

II. Petitioner's tax fraud conviction should also be upheld. There is no merit to his claim that (1) the jury may have been confused as to what constitutes a campaign contribution, and (2) the jury may have focused on whether Agent Cormany, rather than petitioner, believed the $7000 cash payment was a campaign contribution. The instructions accurately defined a campaign contribution, and they emphasized that the government had to prove that the person filing the tax return knew it was false. Moreover, the jury could properly conclude that the $7000 was not a campaign contribution: the $1000 check was payable to petitioner's campaign, but the $7000 in cash was not recorded, was not reported, was not used to pay current campaign expenses, and was available to be used as petitioner chose. Petitioner argued to the jury that even though he did not enter the $7000 cash payment on his campaign records until after he learned that he was under investigation, he received the money as a campaign contribution and subsequently used it to pay old campaign debts. In light of the circumstances in which that payment was accepted, it is not surprising that the jury did not find petitioner's story credible.

ARGUMENT

I. PETITIONER WAS PROPERLY CONVICTED OF EXTORTION UNDER COLOR OF OFFICIAL RIGHT

Petitioner claims that "the district court erroneously charged the jury on extortion under color of official right by not requiring inducement," and that as a result it "authoriz[ed] a conviction based on passive acceptance of a contribution." Br. 24. He further contends that the court's charge on the Hobbs Act count "ignored the *mens rea* required of the defendant, focusing instead on the actions of the payor, an undercover agent." *Ibid.* Examination of the jury charge, however, shows that the charge specifically required the government to prove that petitioner induced the payment from Agent Cormany, and that the jury's attention was properly focused on petitioner's state of mind. Finally, contrary to petitioner's claims, the evidence supports the jury's verdict on the Hobbs Act count, regardless of whether the payment to petitioner is regarded as a bona fide campaign contribution or as a personal payoff disguised as a contribution.

A. The Jury Was Instructed That The Government Had To Prove That Petitioner Intentionally And Wrongfully Induced The Payment

1. *The Majority Rule: Extortion Under Color of Official Right Does Not Require Proof That the Public Official Induced the Payment*

"Extortion" is defined, for purposes of the Hobbs Act, as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). The scope of that definition, and in particular the "color of official right" portion of the definition, has been the subject of judicial and academic debate for the past 20 years. See *McCormick* v. *United States*, 111 S. Ct. 1807, 1813 n.5 (1991); *id.* at 1819 (Scalia, J., concurring). Most courts of appeals have adopted the view that extortion under color of official right is not a subspecies of coercive extortion, but a separate offense, in which property is obtained not because of threats or fear, but because of the public official's office. Under this view, a public official commits a violation if he accepts a payment that is not due him, knowing that the payment was made in return for his official acts; it is not necessary for the public official to take any action to induce the payment, such as a demand, a threat, or a promise.[1]

We submit that the majority view is correct. The language of the statute divides the crime of extortion into two parts: coercive extortion ("the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear") and official extortion ("the obtaining of property from another * * * under color of official

[1] Nine circuits, including the court below, subscribe to the majority view. See *United States* v. *Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); *United States* v. *Spitler*, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); *United States* v. *Jannotti*, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *French*, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *Williams*, 621 F.2d 123, 123-124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States* v. *Butler*, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980); *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F.2d 386, 393-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976).

right"). If the statute is parsed in that fashion, the element of inducement applies only to the offense of coercive extortion, and not to the offense of official extortion. Some courts have read the phrase "under color of official right" to modify the word "induced" rather than the word "obtaining," and thereby to import a requirement of inducement into the official extortion portion of the definition. See *United States* v. *Aguon*, 851 F.2d 1150, 1162-1163 (9th Cir. 1988) (en banc). That interpretation of the language seems strained. If the drafters had intended the inducement requirement to apply to official extortion, it would have been more natural to add the "official right" language to the prepositional phrase "by wrongful use of actual or threatened force, violence, or fear." What is even more telling is that, as we indicate below, the common law formulations from which the Hobbs Act definition was drawn refer to official extortion simply as the obtaining of property under color of official right or under color of office, not the obtaining of property from another, with his consent, induced under color of official right.

At common law "official extortion" was a separate offense from the types of coercive property crimes that were later added by statute and generally grouped in penal codes under the rubric of "extortion." See *United States* v. *Nardello*, 393 U.S. 286, 289 (1969). Official extortion was the acceptance by a public official of an unauthorized payment or fee for the performance of his official duties. See R. Perkins & R. Boyce, *Criminal Law* 442-443 (3d ed. 1982); W. LaFave & A. Scott, *Criminal Law* 704 (1972); *United States* v. *Dozier*, 672 F.2d 531, 539 (5th Cir.), cert. denied, 459 U.S. 943 (1982). It was an offense to accept the fee; neither a demand nor any other

inducement on the part of the public official was required. See Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. Rev. 815, 882-889 (1988).[2]

The "color of official right" language found in the Hobbs Act closely parallels the language used in common law formulations of the offense of official extortion. See 4 W. Blackstone, *Commentaries on the Laws of England* 141 (1769) (extortion "is an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due him, or more than is due, or before it is due"); W. Hawkins, *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) ("extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due."); F. Wharton, *A Treatise on the Criminal Law* § 1574 n.2 (8th ed. 1880) ("Extortion, in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due, or where none is yet due."); *People* v. *Whaley*, 6 Cow. 661, 663-664 (N.Y. Sup. Ct. 1827) (same).

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[2] In his opinion for the panel in *United States* v. *Aguon*, 813 F.2d 1413, 1416-1417 (9th Cir. 1987), Judge Noonan took the position that at common law, at least in the United States, the term "color of official right" has always been construed to mean that the official made a demand. In a detailed study of the common law background of the crime of official extortion, Professor Lindgren convincingly rebuts Judge Noonan's historical analysis. See Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 837-909.

It is ordinarily presumed that a term used in a statutory offense is intended to have the same meaning that it had in the corresponding common law crime. See *Taylor* v. *United States*, 110 S. Ct. 2143, 2155 (1990); *United States* v. *Turley*, 352 U.S. 407, 411 (1957); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them"). Nothing in the text or the legislative history of the Hobbs Act indicates a congressional purpose to depart from the common law definition of official extortion. To the contrary, the definitions of extortion adopted in both the Hobbs Act in 1946 and its predecessor, the Anti-Racketeering Act of 1934, ch. 569, § 2(b), 48 Stat. 980, appear to adopt the settled common law concepts of both coercive and official extortion.

The legislative history is not dispositive with respect to the meaning of the phrase "under color of official right," but it provides some support for the majority view. Other than a confusing exchange in which the sponsors gave a clearly incorrect explanation of the phrase,[3] the sponsors did not propose a

[3] In the course of debate over a proposel to omit the "under color of official right" language, Representatives Hobbs and Sumners said that the phrase referred to persons who were not public officials, but obtained money by claiming to be public officials. See 89 Cong. Rec. 3229 (1943) (statement of Rep. Hobbs); *ibid.* (statement of Rep. Sumners). That interpretation of the phrase cannot possibly be right. It is not dictated by the language of the provision, and it has no pedigree in any common law or statutory source. If there is one universally accepted feature of the crime of extortion

definition or expand upon the statutory language. They explained only that the terms robbery and extortion "have been construed a thousand times by the courts," 91 Cong. Rec. 11,912 (1945) (statement of Rep. Hobbs), and that the definitions of those terms were "based on the New York law," 89 Cong. Rec. 3227 (1943) (statement of Rep. Hobbs); see 91 Cong. Rec. 11,906 (1945) (statement of Rep. Robison); see *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973).

At the time the Hobbs Act was enacted, New York law carried forward the common law offense of official extortion. As early as 1881, the New York Penal Code contained a statute reaching "extortion committed under color of official right." The statute provided that any public officer who asks, receives, or agrees to receive fees or other compensation for his official service in excess of the amount allowed by statute commits extortion. N.Y. Penal Law § 855 (1881). Although the caption of the statute was changed in 1909, see N.Y. Penal Law § 557 (1909), the text remained essentially the same: it continued to reflect the broad common law prohibition against acceptance of unauthorized fees, penalizing not only requests for improper fees or compensation for official

under color of official right, it is that it applies to public officials.

In his concurring opinion in *McCormick*, 111 S. Ct. at 1819-1820, Justice Scalia proposed a related, but more plausible, construction of the term "under color of official right," treating the language as creating a type of false pretenses offense. But that theory is narrower than the common law formulation; given the clear common law basis of the Hobbs Act definition of extortion, it does not seem likely that Congress intended such a narrow construction of the term.

services, but also the receipt of such fees or compensation. See Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 898-899.

The language in the Hobbs Act can be traced to the definition of extortion in the Field Code, a well-known 19th century model penal code, which formed the basis for the revision of the New York Penal Code. See Commissioners of the Code, *The Penal Code of the State of New York* tit. XV, ch. VI, § 613, at 220-222 (1864). The pertinent portions of the Field Code were enacted in New York and in a number of other jurisdictions as well. The Field Code's definition of extortion is almost word-for-word the same as that found in the Hobbs Act. And the Field Code in turn adopted the definition from the language that was used by common law courts and commentators to describe the common law crime of official extortion, *i.e.*, a public official's receipt of payments, made for the performance of official acts, to which the official was not entitled. See *United States* v. *Aguon*, 851 F.2d at 1180 (Wallace, J., dissenting); Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 889-905.

In sum, the legislative history and background of the "under color of official right" branch of the Hobbs Act indicates that Congress intended no departure from the common law concept of official extortion, as it was expressed in the Field Code and subsequent New York Penal Code provisions. For that reason, we submit that the majority of circuits, including the court below, are correct in holding that in order to establish extortion under color of official right under the Hobbs Act, the government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.

Arguments that have been made against this position do not withstand close scrutiny. First, resistance to the broad construction of the phrase "under color of official right" seems to come in part from the lay image of extortion as requiring some threat of injury. As we have noted, however, the common law crime of official extortion carried no such connotation and had no such requirement; that requirement therefore should not lightly be imported into the Hobbs Act, particularly in view of the Act's use of language taken directly from the common law formulation.

Second, at least one commentator has argued that the term "obtaining" in the statutory phrase "obtaining property under color of official right" is inconsistent with passive acceptance. See Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. Chi. L. Rev. 1066, 1078-1079 (1985). The term "obtaining," however, like the closely related term "taking," is simply a way of expressing the traditional common law requirement that the defendant exercise dominion over property in order to complete certain kinds of property offenses, see W. LaFave & A. Scott, *supra*, at 631; it does not carry the connotation of active pursuit.

Finally, a desire to give a narrow construction to the "color of official right" branch of the Hobbs Act appears to derive at least in part from judicial concerns over the expansiveness of the statute if not so limited, and its potential for federalizing many forms of local corruption. See Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977). Congress legislated broadly in the Hobbs Act, however, and this Court has appropriately refused to

fashion artificial limitations on its breadth. For example, in *United States* v. *Culbert*, 435 U.S. 371 (1978), the Court construed the Hobbs Act robbery provision to apply to any robbery that has a minimal effect on interstate commerce. The Court adopted that construction of the statute even though the effect of that construction has the potential to bring a large number of ordinary robberies within federal jurisdiction.

2. *The Minority Position: Extortion Under Color of Official Right Requires "Inducement" by the Public Official*

Focusing on the use of the term "induced" in the definition of extortion, two courts of appeals have held that a public official may not be convicted of extortion under color of official right unless he acted to induce the making of the payment that forms the basis for his conviction. In *United States* v. *O'Grady*, 742 F.2d 682, 687-689 (1984) (en banc), the Second Circuit asked "whether extortion under color of official right occurs when a public official merely accepts unsolicited benefits knowing that they were given because of his public office," 742 F.2d at 684, and held that it does not. In *United States* v. *Aguon*, 851 F.2d 1158 (1988) (en banc), the Ninth Circuit found error in a jury instruction that stated that extortion under color of official right "does not require proof of any specific acts on the part of the public official demonstrating * * * inducement." 851 F.2d at 1161.

This construction of the statute is flawed because, as we have argued above, the term "induced" in the statute applies only to the portion of the definition that refers to coercive extortion, not to the portion

that refers to official coercion. But even if the term "induced" applies to the "under color of official right" branch of the extortion definition, the language still does not support the minority construction of the statute. What is "induced" is the consent of the victim to part with property, and the victim's consent can be "induced" by the public official's office even absent any act of inducement on the part of the public official himself.

While the courts and commentators have debated the merits of the competing positions at length, Judge Posner has accurately observed that "[t]here is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been presented was the official passive." *United States* v. *Holzer*, 816 F.2d 304, 311 (7th Cir.), vacated, 484 U.S. 807 (1987), aff'd in part on remand, 840 F.2d 1343 (7th Cir.), cert. denied, 486 U.S. 1035 (1988); accord *United States* v. *O'Grady*, 742 F.2d at 689-690 (discussing 25 leading "official right" extortion cases, all of which "establish conduct from which inducement can readily be inferred").

It is not likely that the difference between the majority and minority views will produce a different outcome in many cases, because as the Second Circuit observed in *O'Grady*, "[p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a *quid pro quo* would suffice as would other circumstantial evidence tending to show that the public official induced the benefits." 752 F.2d at 691-692. In the case before it, the court added, if the defendant "created the impression, not by words but by deeds, that vendors whose business fortunes with the [New York City Transit Authority] depended on him were expected

to make generous 'gifts' to him, then [the defendant] could not escape conviction." *Id.* at 692. The Ninth Circuit similarly held in *Aguon* that " 'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation' such as might have been communicated by the nature of defendant's prior conduct in office." 851 F.2d at 1166.[4] It is a rare case in which a public official who is receiving an illicit payoff does nothing at all to induce the payoff. While the official may not initiate the transaction that leads to the payoff, the official almost invariably takes some steps to encourage the making of the payment that he intends to accept, although those steps may be subtle and, in settings in which corruption is commonplace, the official's action may amount to little more than reliance on a well-established understanding that payoffs are required to obtain official assistance.[5]

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[4] Subsequent decisions of the Second and Ninth Circuits make clear that *Aguon* and *O'Grady* hold only that a Hobbs Act conviction may not be "based on mere acceptance of a contribution." *United States* v. *Egan*, 860 F.2d 904, 907 (9th Cir. 1988). In *Egan*, the Ninth Circuit affirmed a Hobbs Act conviction because the instructions provided that the defendant could be convicted only if the jury found that he had communicated that favors were for sale. In *United States* v. *Campo*, 774 F.2d 566, 568-569 (1985), the Second Circuit noted that a majority of the court had concluded in *O'Grady* "that 'the jury should be permitted to infer inducement by the defendant based upon a finding of repeated acceptances over a period of time of substantial benefits.' " The court in *Campo* affirmed the Hobbs Act conviction of a police officer who repeatedly accepted $50 from the operator of a business in return for patrolling the area around the business, although the police officer had not requested the payoffs. 774 F.2d at 568.

[5] While it is an open question how the "under color of official right" branch of the Hobbs Act should apply generally to payments to public officials, this Court has already resolved the issue with respect to a subset of such cases—those in which the payments consist of campaign contributions made to elected officials. Last Term, in *McCormick* v. *United States*, 111 S. Ct. 1807 (1991), the Court held that with respect to campaign contributions, a violation of the Hobbs Act is made out only if the official agrees to perform some official service in return for the payment. 111 S. Ct. at 1816. The Court noted that the solicitation and receipt of voluntary contributions is such a widespread and accepted means of campaign financing that the Hobbs Act should not be construed to apply to an elected or campaigning politician receiving funds from a contributor who hopes that the candidate, if elected, will act in a way that the contributor applauds. As we indicate below, the district court gave proper instructions to the jury regarding the applicable legal standard if the jury found the payments to petitioner to constitute a campaign contribution, although the jury's verdict on the tax fraud count, following proper instructions, indicates that it did not find the $7000 cash payment to be a campaign contribution.

3. *The Instructions In This Case Were Consistent With the Minority View That Petitioner Advocates*

While the court of appeals adopted the broader, majority view of the scope of the Hobbs Act, the instructions given by the district court were entirely consistent with the narrower, minority position. Accordingly, regardless of how this Court resolves the conflict among the circuits as to the proper scope of the "under color of official right" branch of the Hobbs Act, petitioner's Hobbs Act conviction must be upheld.

The court's charge informed the jury that the government had to prove the $8000 payment was induced by petitioner. Nothing could be plainer to that effect than the instruction setting out the elements of a Hobbs Act violation. It began: "[T]he defendant can be found guilty of [a Hobbs Act] offense only if all

of the following elements are proved beyond a reasonable doubt: First, that *the defendant induced* the person described in the indictment to part with property or money." J.A. 13 (emphasis added).

In defining "extortion under color of official right," the district court underscored the need for the government to prove that petitioner induced the payment. The court explained that the crime consists of "the wrongful taking by a public officer of money or property not due him or his office," *i.e.*, "the wrongful use of otherwise valid official power." J.A. 13. Accordingly, the court instructed, "if a public official agrees to take or withhold official action [f]or the *wrongful purpose of inducing* a victim to part with property, such action would constitute extortion." *Ibid.* (emphasis added).

Although petitioner alleges that the instructions allowed the jury to convict on the basis of the "passive acceptance of a contribution," Br. 24, the focus of his argument is actually on the claim that the instructions did not require the jury to find that he *initiated* the transaction. In addition, he makes the related claim that the instructions did not require the jury to find "an element of duress such as a demand." Br. 22.

Petitioner alleges that Agent Cormany was "the aggressor" who made "repeated calls to initiate meetings." Br. 40. But even if the Hobbs Act requires proof of acts of "inducement," as the Second and Ninth Circuits have held (and as the district court's instructions provided), no court holds that it requires proof of "initiation." Nothing in the text or background of the statute would support such a requirement, which would immunize some of the most aggravated forms of public corruption from prosecution

under the Hobbs Act as long as the official was careful not to be the one to broach the subject of payoffs.

In connection with his claim that the Hobbs Act requires proof that the public official initiated the exchange and subjected his victim to duress, petitioner argues that "[t]he evidence at trial against [petitioner] is more conducive to a charge of bribery than one of extortion." Br. 40. While the evidence in this case may also have supported a charge of bribery, it is not a defense to a charge of extortion under color of official right that the defendant could also have been convicted of bribery. Even those courts that have adopted an inducement requirement for extortion under color of official right do not require proof that the inducement took the form of threats or demands. *United States* v. *O'Grady*, 742 F.2d at 687; *United States* v. *Aguon*, 851 F.2d at 1166. Thus, if a public official accepts or (under the minority view) induces a payment in return for an agreement to exercise official power, he is guilty of extortion under color of official right, even though he may also be guilty of soliciting a bribe. See *United States* v. *Aguon*, 851 F.2d at 1167.[6]

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[6] Occasionally, courts dealing with extortion by force or fear have stated that such extortion and bribery are mutually exclusive. *See e.g.*, *People* v. *Feld*, 262 A.D. 909, 28 N.Y.S.2d 796, 797 (Sup. Ct. 1941); see also *People* v. *Dioguardi*, 8 N.Y.2d 260, 273-274, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960). That may be a correct observation where the allegation is that the victim was intimidated into making a payment (extortion by force or fear) and did not offer it voluntarily (bribery). But such cases do not stand for the proposition that extortion under color of official right and bribery are mutually exclusive offenses either under the common law or the Hobbs Act.

The court of appeals, J.A. 43, accepted petitioner's contention that the district court's instructions "permitted the

In sum, the instructions given by the district court imposed on the government the burden of showing that petitioner induced the payment that was the subject of the prosecution. Because the "inducement" requirement is embraced by only two circuits—not including the circuit in which petitioner was tried—the instructions were thus quite favorable to petitioner. Perhaps for that reason, petitioner did not object to the instructions on the ground that they failed adequately to set forth the requirement of inducement. Because of petitioner's failure to object on that ground, petitioner's challenge to the "inducement" instructions must be reviewed under the plain error standard. We submit that even if the district court's instructions on inducement could have been more elaborate, any inadequacy in those instructions was certainly not so "egregious" that a "miscarriage of justice" resulted, justifying a finding of plain error. See *United States* v. *Young*, 470 U.S. 1, 15 (1985).

B. The Jury Was Correctly Instructed On The Standard Applicable To Campaign Contributions

In *McCormick* v. *United States*, 111 S. Ct. at 1816, this Court held that the receipt of campaign contributions is vulnerable under the Hobbs Act "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Although this case was

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jury to convict [petitioner] without finding that he conditioned the performance of an official act upon payment of money," *i.e.*, the jury did not have to find that petitioner threatened not to take action unless a payment was made. But, as we have noted, no court of appeals regards inducement as requiring proof of a threat or demand.

tried before *McCormick* was decided, the district court's instruction on the campaign contribution issue conformed remarkably closely to the test that this Court subsequently adopted in *McCormick*. The district court instructed as follows (J.A. 17):

> [T]he acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Petitioner argues (Br. 46-47) that this instruction did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution. He argues that "there is no *quid pro quo* until and unless [the public official complies or attempts to comply with the request since no action at all has been required of the defendant." Br. 47. Petitioner did not raise this objection to the instruction either in the district court or in the court of appeals. In any event, the argument is wholly without merit. In circumstances where a campaign contribution is extorted under color of official right, the offense is completed at the time the public official receives a payment in return for his agreement to perform specific official acts. Fulfillment of the *quid pro quo* is not an element of the offense. Indeed, it is not an element of the offense that the public official even intended to fulfill the *quid pro quo*, as long as he obtains a payment by com-

municating an intention to exchange his services for money.[7]

Relying on *United States* v. *Dozier*, 672 F.2d 531 (5th Cir), cert. denied, 459 U.S. 943 (1982), petitioner further contends (Br. 46) that the "campaign contribution" instruction was inadequate because the Hobbs Act is not aimed at "every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits," but instead "penalize[s] those who, under the guise of requesting 'donations,' demand money in return for some act of official grace." 672 F.2d at 537. But the instruction at issue in this case is entirely consistent with the Fifth Circuit's analysis in *United States* v. *Dozier*. The instruction emphasized that the mere acceptance of campaign contributions does not constitute a violation of the Hobbs Act, "even though the donor has business pending before the official"; it made clear that a campaign contribution can give rise to criminal liability only if the public official receives the funds in return for an official act, *i.e.*, "in exchange for [a] specific requested exercise of his or her official power." J.A. 17.

C. The Jury Was Properly Instructed To Focus On Petitioner's Actions And Intentions

The only pertinent objection that petitioner made to the jury instructions at trial was that the campaign contribution instruction "improperly focuse[d] on

[7] Petitioner's argument seems in part to be based on a misinterpretation of the term "requested" as used in the instruction. The instruction does not say that the public official must have accepted a payment "in exchange for a specific request of him," as petitioner argues (Br. 47); it says that the public official must have accepted a payment in exchange for a "specific requested exercise of official power," *i.e.*, an exercise of official power that the party making the payment has requested.

the motives of the contributor [Agent Cormany] instead of on the intent of the public official [petitioner]." J.A. 26. Petitioner renews that claim here, arguing that the campaign contribution instruction "place[d] the focus on the actions of the agent rather than the intent of the public official." Br. 45. That characterization of the charge is wrong both with respect to the specific instruction that petitioner challenged and with respect to the instructions as a whole.

First, contrary to petitioner's assertion, the district court did not state that a violation of the Hobbs Act may be based on the acts and intentions of the person who makes the payment. The very instruction on which petitioner focuses states that a violation may be shown only "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power." J.A. 17. Even read in isolation, that instruction did not tell the jury to focus on Agent Cormany's intentions. Rather, the instruction described a situation where a public official "accepts money in exchange for" a specific requested exercise of his official power. The quoted phrase thus includes a requirement that an understanding was reached between petitioner and Cormany, and it specifically directs attention to *petitioner's* side of the transaction.

Other instructions also made clear to the jury that it was to focus on petitioner's state of mind, not Cormany's. The district court instructed the jury that "extortion in a case involving a public official means the wrongful acquisition of property from someone else * * * [,] the wrongful taking by a public official of money or property not due him * * * [,] the wrongful use of otherwise valid official power * * * [, and] agree[ing] to take or withhold official action

[f]or the wrongful purpose of inducing a victim to part with property." J.A. 13. In addition, the jury was instructed that the government was required to prove that petitioner "induced" a payment "knowingly and willfully by means of extortion." *Ibid.* The jury was further charged that "the word 'willfully' * * * means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law," and that "the word 'knowingly' * * * means that the act * * * was [done] voluntarily and intentionally and not because of mistakes or accident." J.A. 19. These instructions all focus unambiguously on the actions and intentions of petitioner and refute petitioner's claim that "the district court's instruction places the focus on the actions of the agent rather than the intent of the public official." Br. 45.

Finally, the instructions were particularly directed at the actions and intentions of petitioner because this was an "attempt" case. There was no "victim" of extortion in this case because Agent Cormany worked for the FBI. Accordingly, the indictment charged petitioner with attempted extortion in violation of the Hobbs Act. The district court's explanation of the crime of attempt specifically focused the jury's attention on petitioner's conduct and mental state, since the court charged the jury that "[t]o attempt an offense means intentionally to do some act in an effort to bring about or accomplish something the law forbids to be done," and it was petitioner (not Agent Cormany) who was charged with attempted extortion. J.A. 14.[8]

[8] The court of appeals said that the instructions did not express the requirement that "the public official *knew* that the payment he received was motivated by a hope of influence * * * as clearly as it might have." J.A. 47. The court suggested that the instructions would have been clearer if they had stated that the jury "could only convict '[i]f the public official knows the motivation of the victim focused on the public official's office.'" J.A. 47 n.7. But the instructions in this case were far more specific than the version the court of appeals suggested. Rather than merely requiring the jury to conclude that petitioner knew that Agent Cormany's motivation "focused on" petitioner's office, the charge in this case (1) required the jury to find that petitioner "induced" the payment, J.A. 13; (2) gave as an example of extortion "under color of official right" a situation where "a public official agrees to take or withhold official action [f]or the wrongful purpose of inducing a victim to part with money," *ibid.*; and (3) explained with respect to petitioner's campaign contribution defense that a public official commits extortion with respect to a campaign contribution only if he "demands or accepts money in exchange for [a] specific requested exercise of his or her official power," J.A. 17.

D. The Evidence Supports The Jury's Conclusion That Petitioner Wrongfully Induced The Payment By Agreeing To Exercise Official Power In Return For The Payment

The evidence in this case was sufficient to prove that petitioner, by his affirmative conduct, wrongfully induced a payment from Agent Cormany in return for the exercise of his official power. Petitioner (Br. 2-19) argues his contrary interpretation of the facts to this Court, as he did to the jury. But even without the assistance of the familiar rule that the evidence in support of a jury verdict must be viewed in the light most favorable to the government, *Jackson* v. *Virginia*, 443 U.S. 307, 326 (1979), the facts we have summarized above clearly show a public official selling specific services for a price and then performing on his undertaking. While petitioner displayed

caution and even occasional coyness in his relationship with Cormany, a fair reading of the facts makes it clear that petitioner sought a payment from Cormany knowing that Cormany needed his assistance in connection with the rezoning application, and that he went to exceptional lengths to support the application after the money was paid.

Petitioner claims that he "never indicated that Cormany was required to make any campaign contribution nor did he place any conditions on his help." Br. 14. But at one of the initial meetings, on August 14, 1985, when Johnson suggested that Cormany's group would offer petitioner "substantial fees," petitioner responded, "Oh, I understand. I understand." Petitioner then assured Cormany and Johnson that, while others might take their money and do nothing for it, "if I was gonna say that I'm gonna help, that means I'm gonna talk to the folk and do what we have to do." GX 1T, at 20-21.

Petitioner communicated that a payment was required by bringing his campaign finance records to Cormany's office on July 24, 1986, and presenting them after Cormany described his need for assistance. The jury was entitled to infer from petitioner's raising the subject of his campaign, both at that meeting and at the earlier meeting in May, that he meant to convey that Cormany should make some substantial payment in exchange for petitioner's support of his development project. Petitioner said: "[W]hat I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that. * * * [I]f you didn't give me but three [thousand], on this, I've promised to help you. * * * If you gave me six [thousand], I'll do exactly what I said I was gonna do for you.

If you gave me one [thousand], I'll do exactly what I said I was gonna do for you." J.A. 36-37. While petitioner was careful to say he would work for Cormany whether Cormany gave him $1000, $3000, or $6000, he did not tell Cormany that he would exert himself if no substantial payment was made.

In determining whether petitioner was attempting to solicit a corrupt payment, the jury was entitled to take note of the obviously sinister connotation of such statements by petitioner as "you don't know how I operate," "I understand both of us are groping * * * for what we need to say to each other," and that part of the payment should be in cash "so there won't be any, any, tinges, or anything." J.A. 36-37. The jury was also justified in inferring petitioner's wrongful intentions from petitioner's acknowledgement of understanding in response to Cormany's statement that he would be willing to make a payment to petitioner even if he was not campaigning. J.A. 38.

It was significant that petitioner took the initiative in suggesting how the payment should be divided, with $7000 being paid in cash and $1000 by check, and only the latter to be reported as a campaign contribution. J.A. 37. The jury also could infer that petitioner's denial to FBI agents that he had received any cash contribution from Agent Cormany reflected his consciousness that the payment was a wrongful payoff when he received it. Finally, the jury could properly conclude from petitioner's assiduous efforts on Cormany's behalf and his active participation as an internal lobbyist for Cormany's rezoning effort, that petitioner regarded the $8000 payment as a fee for services to Cormany's organization.

In this case, the evidence consisted primarily of video and audio recordings, which enabled the jury

to witness the crime as it was committed. The jury was thus in a position to assess the inflections, pauses, and other emphases given to the spoken words by petitioner in order to convey his meaning and intentions. Moreover, for six days of trial, petitioner testified extensively in support of his various theories of defense, and he was subject to extensive cross-examination. The jury had every opportunity to assess petitioner's explanations and his credibility. Evidently, the jury disbelieved petitioner when he sought to explain his conduct as innocent. There is no reason for this Court to disturb the jury's verdict.

II. THE JURY WAS PROPERLY INSTRUCTED, AND THE EVIDENCE WAS SUFFICIENT, ON THE TAX FRAUD COUNT

With respect to petitioner's conviction for filing a false personal income tax return, the district court charged the jury that "[a] campaign contribution can involve a gift, loan, forgiveness of debt, advance or deposit of money or the conveyance or transfer of anything of value for the purpose of influencing the nomination or the election of any person for office." J.A. 17. Petitioner argues that the court erred by not further explaining the term, Br. 49. Petitioner also suggests that the jury may have been confused about whether it had to determine that petitioner or Agent Cormany thought the $7000 cash payment was a campaign contribution. Br. 49-50.

In the district court, petitioner did not object to those aspects of the charge. See J.A. 26. Petitioner also did not raise this claim in the court of appeals, as he acknowledges. Br. 50. Petitioner argues, however, that his challenge to the tax fraud count raises

"subsidiary question[s]" that are "fairly included" in the question presented respecting his Hobbs Act conviction. *Ibid.*; see Sup. Ct. R. 14.1(a). In our view, it is clear that petitioner's tax fraud conviction is not properly before this Court, but in any event petitioner's contentions are entirely without merit.

The instruction on the tax fraud count made it clear that if the money received by petitioner "was a campaign contribution and * * * was used to pay campaign expenses or debts," petitioner was not required to report it as income. J.A. 19. Because the court instructed the jury that petitioner's tax return had to be knowingly false in order for his conduct to be criminal, J.A. 18, the jury must have understood that what mattered was whether petitioner treated the $7000 cash payment as a contribution to his campaign and used it to defray campaign expenses.

Contrary to petitioner's suggestion, Br. 49, the instructions in this case are readily distinguishable from the flawed instructions that were given in *McCormick* v. *United States*, 111 S. Ct. 1807 (1991). In *McCormick*, the district court instructed the jury that a campaign contribution must be "voluntary" in the sense that it was "freely given without expectation of benefit." *Id.* at 1814. But a campaign contribution, as commonly understood, often is given because the payor expects some benefit. *Id.* at 1816. Thus, in *McCormick*, it was erroneously suggested to the jury that a payment that was a campaign contribution in common parlance might not be a "campaign contribution" for purposes of the Hobbs Act or the tax fraud statutes. *Id.* at 1817. In this case, by contrast, the jury was instructed as follows (J.A. 16-17):

> The solicitation of campaign contributions from any person is a necessary and permissible form of

> political activity on the part of persons who seek political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

Under this instruction, there was no suggestion that a campaign contribution was not legitimate if it was motivated by the expectation of a benefit. For that reason, unlike in *McCormick*, the instruction did not erect an improper barrier to petitioner's argument that he merely received a campaign contribution from Cormany, not a payoff.[9] Accordingly, the risk of jury confusion that was present in *McCormick* was absent in this case.

Finally, the evidence fully supports the jury's verdict on the tax fraud count. On his personal income tax return for 1986, which was filed before he knew he was under investigation, petitioner did not report as income the $7000 cash payment he received from Agent Cormany. Petitioner argued at trial that the $7000 was a campaign contribution and that he had used $4100 of it to repay a portion of an old campaign debt to his mother and the remaining $2900 to repay himself for loans he made to his campaigns.

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[9] Of course, both a Hobbs Act violation and a tax fraud violation may be premised on the receipt of a campaign contribution. If a campaign contribution is obtained as a *quid pro quo* for a specific official act, it can result in a violation of the Hobbs Act, as the jury was instructed. J.A. 17; see *McCormick*, 111 S. Ct. at 1816-1817. Also, if money was received as a campaign contribution but converted to the defendant's personal use during the tax year, willful failure to report it on his personal income tax return for that year would constitute a false-filing offense.

With respect to those arguments, the district court instructed the jury (J.A. 19) that

> if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return.

The jury apparently disbelieved petitioner's claims, and for good reason. Although both Cormany and petitioner referred to the $7000 payment as a campaign contribution, petitioner did not treat it in that manner. He did not report it; he did not record it among his contributions; and he did not use it to retire current campaign expenses. Petitioner's claim to have used the funds to reimburse his mother and himself for loans to an earlier campaign—a claim that arose only after petitioner became aware of the investigation—does little to rebut the government's contention at trial that the payment was simply a payoff dressed up in euphemistic attire. The jury was therefore entitled to conclude that the $7000 was not a campaign contribution at all and should have been reported as personal income on petitioner's federal income tax return.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-6105

In The

Supreme Court of the United States

October Term, 1991

JOHN H. EVANS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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I. Respondent's Argument Regarding "Plain Error"

The objections made by Petitioner to the charge to the jury in the district court are characterized by Respondent as follows:

> When the court entertained objections to the jury charge, petitioner focused on the instruction that provided that "[i]f a public official demands or accepts money in exchange for specific requested exercises of his official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." J.A. 26. Petitioner objected to the language "in exchange for specific requested exercises of his official power," explaining that, in his view, "it improperly focuses on the motives of the contributor instead of the intent of the public official." *Ibid*. Petitioner contended that the instruction would have been clearer "if it were stated that the money was accepted with an agreement to perform official action as to – in place of the language 'Requested exercises of official power.' " *Ibid*. Petitioner made no other relevant objections to the jury charge. The district court declined to modify the charge. Br., pp. 15-16.

From this statement, Respondent goes on to argue that "petitioner did not object to the instructions on the ground that they failed adequately to set forth the requirement of inducement. Because of petitioner's failure to object on that ground, petitioner's challenge to the 'inducement' instructions must be reviewed under the plain error standard." Br., p. 34.

Respondent's *Statement* relating to the objections made by Petitioner to the charge is incomplete and Respondent's conclusion that a plain error standard is appropriate is erroneous.

By way of background, the charge conference in the district court was not taken down by a court reporter. At the end of this lengthy (5½ week) trial, the court excused the jury for a day between the closing of evidence and the argument and charge. *See* R40-76-79, 164. Throughout the trial all proceedings, including bench conferences, were routinely recorded. During that off day, the charge conference was held but, inexplicably and without notice to counsel, no court reporter was summoned. Therefore, the only recorded objections are those made after the court's charge to the jury the following day. *See objections at* R41-150-53.

However, even without a transcript of the charge conference the record is ample that counsel for Petitioner-defendant did indeed object to the lack of a demand or solicitation in the charge as it related to inducement.

First, the Eleventh Circuit Pattern Instructions use the word "inducement" in their offense instructions on extortion, including extortion under color of official right. *Pattern Jury Instructions, Criminal Cases,* pp. 168-69 (Eleventh Circuit, West Ed. 1985). Counsel submitted written requests to charge which requested the pattern charge as it related to extortion under color of official right. *See* R3-74, Request 12. That portion of the pattern charge reads, in pertinent part, as follows:

> So if a public official misuses his office by *threatening* to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a *threat* would constitute extortion even though the official was already duty bound to take or withhold the action in question. Id. at 169 (emphasis supplied).

However, the district court bowdlerized the pattern charge by eliminating the requirement of an affirmative "threat." The watered-down pattern charge given by the Court was as follows:

> So, if a public official *agrees* to take or withhold official action or (sic) the wrongful purpose of inducing a victim to part with property, such *action* would constitute extortion even though the official was already duty-bound to take or withhold the action in question. (emphasis supplied) R41-136-37.

Thus, petitioner requested and the court refused to give the pattern charge as written.

Second, petitioner had also requested the following language in its written requests to charge filed with the court, citing, *inter alia, United States v. Dozier,* 672 F.2d 531 (5th Cir. 1982):

> The government must prove beyond a reasonable doubt that money received by John Evans was *solicited* and received unlawfully, that is wrongfully under color of official right. (emphasis supplied). R3-74, Request 15.

Third, consistent with petitioner's theory that he must be shown to have conditioned his support upon receiving a contribution, Petitioner also requested, in its "theory of the defense" charge, the following language:

> Evans contends that *he never threatened to withhold his support* if he did not receive a campaign contribution and that he would have rendered the same assistance to Hawkins regardless of the size of any campaign contribution or whether he received any campaign contribution at all. (emphasis supplied). R3-74, Request 19.[1]

The notion of a requirement of conditioning support upon the payment of a contribution is central to petitioner's position and was emphasized by the court in *United States v. Dozier*:

> At the very least, elected officials are, and have been, on notice that any public officer, elected or otherwise, who makes performance (or nonperformance) of an official act contingent upon payment of a fee – whether or not the fee actually is paid or the act actually performed – is guilty of extortion "under color of official right." *Id.* at 540.

Fourth, leaving aside the charge conference for which there is no record, in objections made after the court's charge to the jury, Petitioner continued to reaffirm his position, again citing *United States v. Dozier, supra*:

> The second exception as to the definition of "campaign contributions" in the Court's charge, the language that says that "if a public official demands or accepts money in exchange for specific requested exercises of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of

[1] Although the district court gave petitioner's request, the court made clear to the jury that these were the contentions of petitioner, not the law as given by the court. R41-133-35.

> whether the payment is made in the form of a campaign contribution." *We believe the language "in exchange for specific requested exercises of his official power" is inconsistent with the holding in Dozier, the Fifth Circuit case in 1982, 672 Fed.2d 531; that it improperly focuses on the motives of the contributor instead of on the intent of the public official, or the recipient, and the page references were 537 and 542 of the Dozier opinion.* (emphasis supplied).
>
> We think the language should have been clearer, if it were stated that the money was accepted with an agreement to perform official action as to – in place of the language "requested exercises of official power."

The Court: All right, sir. Yes, I'm familiar with Dozier. R41-152-53.

The thrust of petitioner's argument was language in *United States v. Dozier* which correctly embodied petitioner's position. A review of the two referenced page citations to the *Dozier* case articulated by petitioner's counsel demonstrates that each refers to the twin focus of petitioner – the articulation of a demand or solicitation and the need to emphasize the intent of petitioner rather than the motivation of the undercover agent. The specific reference to page 537 of the opinion in *United States v. Dozier* by petitioner-defendant's counsel reveals the following language:

> Where the accused is or was an elected official authorized under our system to solicit contributions, however, a fine line may separate a request for support from the sale of a favor. As a sister court has observed, *"No politician who*

> *knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation.*" (citation omitted) Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits. We must, nevertheless, discover and penalize *those who*, under the guise of requesting "donations," *demand money* in return for some act of official grace. *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982) (emphasis supplied):

The second page reference by petitioner-defendant's counsel, page 542 of the opinion in *Dozier*, is as follows:

> The case before us . . . involves an extortion charge. The emphasis is on the defendant's own motives rather than on his perception of a potential contributor's motive. The issue is whether Dozier "knowingly and willingly" induced some of his constituents to pay him money *by threatening to take or withhold official action*[2], *not whether he accepted money as contributions with "knowledge" of a donor's corrupt intent*. *United States v. Dozier*, 672 F.2d 531, 542 (5th Cir. 1982) (emphasis supplied).

Set in context, Petitioner's objections are right on the mark and the citations given clearly reflect the position taken by Petitioner with which the Court was already

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[2] The italicized language ending with the word "action" is identical to a portion of the Eleventh Circuit pattern instruction requested by Petitioner but modified substantially by the district court. Apparently, *United States v. Dozier supra*, was used as a reference for the Eleventh Circuit pattern charges.

familiar. By the time those citations were laid on the record after the court had given its charge, the district court had the benefit of the charge conference and petitioner's written requests to charge and had determined that it was not going to give the charges requested by Petitioner. The Court did not discuss exceptions to the charge with either the government or the Petitioner-defendant after the charge was given apparently because it was familiar with each party's position.

Contrary to what Respondent asserts, Counsel's objections to the district court taken as a whole are identical to the arguments raised in this court. It cannot be argued in good faith that a plain error standard should apply here. The fact that the Court intentionally changed the pattern charge so that it required only an "agreement" by petitioner rather than a "threat" to take or withhold official action in order to induce a victim to part with money, as the pattern charge provides, is clear evidence that the court had considered and rejected petitioner's oral requests and argument in the charge conference and petitioner's written requests of the pattern charge and a charge requesting "solicitation." The court went on to instruct the jury in language which became the focal point of the issue here and ironically, it is likely that the charge given by the court came from language found in *United States v. Dozier, supra,*[3] so it is

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[3] The most critical instruction here regarding "inducement" was as follows:

> [I]f a public official demands or accepts money in exchange for specific requested exercise (sic) of his

(Continued on following page)

hardly surprising that the court responded on the record to counsel after petitioner's objections that the court was "familiar with Dozier." R41-152-53.

It is in that context that one must view petitioner's objections on the record after the charge and his reference to specific pages within *United States v. Dozier.* One can feel confident upon reviewing the complete record that the Court was conversant with *United States v. Dozier, supra,* and with the issues raised by petitioner, a proposition directly at odds with the government's argument of plain error. It is not surprising that the Assistant United States Attorney who tried this case in the district court and who also represented the government on appeal in the Eleventh Circuit did not advocate the plain error argument now suggested by the government for the first time.

(Continued from previous page)

> or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. R41-141.

It appears that language from the charge was adapted from *dictum* found in *United States v. Dozier,* 672 F.2d 531 (5th Cir. 1982], wherein the Fifth Circuit was discussing defendant Dozier's challenge to the Hobbs Act on grounds of vagueness:

> If this technical meaning of the [Hobbs] Act is inadequate to apprise an official of ordinary mental competence that *he may not demand or accept money in return for requested exercises of his official power,* judicial elaborations offer assistance. *Id.* at 539 (emphasis supplied).

II. The Statutory Language

The government argues that the statutory language should be read so that the word "induced" modifies only what is referred to as "coercive extortion" or the obtaining of property by actual or threatened force, violence or fear, acknowledging that "[s]ome courts have read the phrase 'under color of official right' to modify the word 'induced' rather than the word 'obtaining,' and thereby to import a requirement of inducement into the official extortion portion of the definition." Br., pp. 21-22.

It would be more accurate to say that most courts (and commentators[4]) including those espousing the "majority view" read the word "induced" as being modified by the official extortion clause, as well as the coercive extortion clause, including the court below. *See United States v. Evans,* 910 F.2d 790, 796-97 (11th Cir.), cert. granted *sub nom Evans v. United States,* 111 S.Ct. 2256 (1991). Only one case cited by Respondent, *United States v. Jannotti,* 673 F.2d 578, 594 (3d. Cir.) (*en banc*), cert. denied, 457 U.S. 1106 (1982), parses the statutory language as Respondent suggests. In doing so, without discussing the issue of "parsing", the en banc court relies on two other third circuit cases, one also sitting en banc, both of which viewed the issue differently than *Jannotti,* approving language which places "under color of official right" as modifying "induced." *See United States v. Kenny,* 462 F.2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914

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[4] *E.g.,* Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act,* 35 U.C.L.A. L. Rev. 815, 837 (1988).

(1972); *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir.) (*en banc*), cert. denied, 423 U.S. 1014 (1975).[5] Of the remaining cases cited by Respondent as representing the circuits which subscribe to the "majority view," only *United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988) states, without elaboration, that, "inducement is not an element of extortion in this circuit," but the reader is left guessing as to exactly how the Seventh Circuit reached that conclusion. For example, in oft-quoted (although uninstructive) language, *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), also from the Seventh Circuit plainly speaks of public officials "inducing" payments[6] and is itself cited by two "majority view"

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[5] The seminal case of *United States v. Kenny, supra*, approved a district court instruction which read:

> The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. *Id.* at 1229.

In *United States v. Mazzei, supra*, the en banc third circuit stated:

> We conclude that Kenny properly read the statute and that a showing of the inducement of payments, "under color of official right" may replace proof of the coercion of "force, violence or fear" in a Hobbs Act prosecution. *Id.* at 645.

As many of these cases do, the court in *Mazzei* looked to the defendant's position as a public official for the "inducement." *Ibid.*

[6] *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974) states:

> It matters not whether the public official *induces* payments to perform his duties or not to perform his

(Continued on following page)

cases noted by Respondent. See, *United States v. French*, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States v. Butler*, 618 F.2d 411, 418 (6th Cir.), cert. denied, 447 U.S. 927 (1980). The case of *United States v. Spitler*, 800 F.2d 1267, 1274-75 (4th Cir. 1986), cited as representing the majority view, does not reveal how it views "inducement" as it relates to the parsing of the statute even though it found the defendant "coercively demanded" the items in question, and the remaining three cases cited by Respondent all cite the power of the office as the "inducement" for the "under color of official right" clause. See *United States v. Williams*, 621 F.2d 123, 124, 126 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States v. Hall*, 536 F.2d 313, 320 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976).

Finally, although the government is not required to take a consistent approach in these matters, one notes with interest the fact that the parsing-of-the-statute argument advocated here was apparently not made by the government last term in its brief in *McCormick v. United States*, 111 S.Ct 1807 (1991) where the government argued that "[e]xtortion is ordinarily understood to mean the act of obtaining money by consent, where the consent is *induced* by a threat of some kind of injury in the future"

(Continued from previous page)

> duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. (emphasis supplied)

(citation omitted) and also that, "[t]hus, extortion under color of official right was understood in New York (and therefore presumably by the Congress that adopted New York law as the basis for the Hobbs Act) to apply to the *inducement* of payoffs by an elected official in return for his services." *Brief For The United States*, pp. 23, 20 (emphasis supplied).

In summary, for the most part, even those representing the "majority view" agree that the natural reading of the statute is "the obtaining of property from another, with his consent, induced . . . under color of official right." Petitioner also agrees with the government's position as stated in their brief in *McCormick v. United States, supra*, that, by definition, the ordinary understanding of "extortion", whether under color of official right or otherwise, has to do with one party inducing another to part with property. That historical understanding strongly suggests that if Congress had a different interpretation when it enacted the Hobbs Act, it would have said so.

III. Petitioner Has Never Claimed That A Conviction Under The Statute Requires A Public Official to Initiate The Transaction.

In its brief, the government states:

> Although petitioner alleges that the instructions allowed the jury to convict on the basis of the "passive acceptance of a contribution," Br. 24, the focus of his argument is actually on the claim that the instructions did not require the jury to find that he *initiated* the transaction." Br. 32.

Petitioner does not now and has never contended that the instructions of the court in a Hobbs Act case require the jury to find that Petitioner initiated, as opposed to induced, the transaction.

Respectfully submitted,

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